91-1859

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LITTON MICROWAVE COOKING PRODUCTS, DIVISION OF LITTON SYSTEMS, INC.,
(Predecessor to Microwave Products of America, Inc.)
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do Sections 8(a)(5) and 8(d) of the National Labor Relations Act, 29 U.S.C. §§ 158(a) and (d), compel an employer to always bargain to impasse with the union representing its employees prior to implementing a change in wages?

2. Do Sections 8(a)(5) and 8(d) of the National Labor Relations Act, 29 U.S.C. §§ 158(a) and (d), compel an employer to grant all employees in a newly-certified bargaining unit *a discretionary, merit wage increase* which it had granted to some, but not all, bargaining unit employees, in years prior to the union's certification, at a time when the employer and the newly-certified union are engaged in *good-faith* negotiations over an *initial* collective bargaining agreement, the union has received more than *60 days' notice* of the employer's proposal not to grant such an increase, and the union has been afforded *ample opportunity to negotiate* over such wage proposal?

PARTIES TO THE PRECEEDING*

The name of the only party to the proceeding in the Court of Appeals for the Eighth Circuit which is not listed in the caption of the case in this Court is:

United Electrical, Radio and Machine Workers of America (UE)

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* Littion Industries, Inc. is the parent corporation of the petitioner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

REPORTS OF OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

1. Background 4
2. Board Proceedings 5
3. Court of Appeals Decision 7
4. Basis of Jurisdiction in Court of Appeals 7

ARGUMENT 8

I. REASONS FOR GRANTING THE WRIT . . . 8

Page

II. THERE IS NO OBLIGATION UNDER SECTION 8(a)(5) OF THE NATIONAL LABOR RELATIONS ACT REQUIRING AN EMPLOYER WHICH IS BARGAINING IN GOOD FAITH WITH A UNION OVER WAGES TO NEGOTIATE TO A GOOD-FAITH BARGAINING IMPASSE PRIOR TO IMPLEMENTING ITS WAGE PROPOSAL. 8

III. *NATIONAL LABOR RELATIONS BOARD V. KATZ*, 369 U.S. 736 (1962) DOES NOT REQUIRE AN EMPLOYER WHICH IS BARGAINING IN GOOD FAITH WITH A UNION OVER AN INITIAL CONTRACT TO PAY DISCRETIONARY MERIT INCREASES; ON THE CONTRARY, *KATZ* PROHIBITS SUCH PAYMENTS. 11

CONCLUSION. 13

APPENDIX A

OPINION, U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED NOVEMBER 12, 1991 . . . . . A1

Page

APPENDIX B

DECISION AND ORDER, NATIONAL LABOR RELATIONS BOARD, DATED SEPTEMBER 28, 1990 . . . . . B1

APPENDIX C

SELECTED PORTIONS OF DECISION OF ADMINISTRATIVE LAW JUDGE . . . C1

APPENDIX D

JUDGMENT, U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT, DATED NOVEMBER 12, 1991 . . . . . D1

APPENDIX E

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC, U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT, DATED DECEMBER 23, 1991. . . . E1

TABLE OF AUTHORITIES

Page

Cases

Alpha Biochemical Corp.
293 NLRB No. 92 (1989) 14

American Telecommunications Corporation
249 NLRB 1135 (1980) 10

Association of D. C. Liquor Wholesalers
292 NLRB No. 132 (1988). 14

B.F. Goodrich Company
195 NLRB 914 (1972) 10

Carpenter Sprinkler Corporation v.
National Labor Relations Board
605 F.2d 60 (2d Cir. 1979). 9

Cone Mills Corporation v. National
Labor Relations Board
413 F.2d 445 (4th Cir. 1969). 10

Dependable Building Maintenance Co.
274 NLRB 216 (1985) 14

E. I. DuPont & Co.
268 NLRB 1075 (1984) 14

Excelsior Pet Products, Inc.
276 NLRB 759 (1985) 14

First National Maintenance Corp. v.
National Labor Relations Board
452 U.S. 666 (1981) 15

Page

H. K. Porter v. National Labor Relations Board
397 U.S. 99 (1970). 14

Industrial Union of Marine & Shipbuilders Workers of America v. National Labor Relations Board
320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964) 9, 10

Nabors Trailers, Inc. (nka Steego Transportation Equipment Centers, Inc.) v. National Labor Relations Board
910 F.2d 268 (5th Cir. 1990). 8-10

National Labor Relations Board v. Auto Fast Freight, Inc.
793 F.2d 1126 (9th Cir. 1986) 10

National Labor Relations Board v. Citizens Hotel Company
326 F.2d 501 (5th Cir. 1960). 9

National Labor Relations Board v. H. & H. Pretzel Company
831 F.2d 650 (6th Cir. 1987). 10

National Labor Relations Board v. Katz
369 U.S. 736 (1962) 7, 8 11-13

National Labor Relations Board v. Laney & Duke Storage Warehouse Co.
424 F.2d 109 (5th Cir. 1970). 9

Page

National Labor Relations Board v. Nabor Trailers, Inc., (nka Steego Transportation Equipment Centers, Inc.) Docket No. 90-1165 . . . . . 8, 10, 13

National Labor Relations Board v. U. S. Sonics Corporation 312 F.2d 610 (1st Cir. 1963) 9

Owens-Corning Fiberglass Corp. 282 NLRB 609 (1987) 14

Richmond Recording Corp. v. National Labor Relations Board 836 F.2d 289 (7th Cir. 1987) 10

Saunders House 265 NLRB 1632 (1982), *rev'd*, 719 F.2d 683 (3rd Cir. 1983) 14

Shell Oil Company, Inc. 77 NLRB 1306 (1948) 10

Sierra Publishing 291 NLRB No. 84 (1988) 14

Taft Broadcasting Co. 163 NLRB 475 (1967) 13

Valley Mould 288 NLRB 1015 (1988) 14

Winn-Dixie Raleigh, Inc. 267 NLRB 231 (1983) 10

Page

Statutes

28 U.S.C. §1254(1) 2
29 U.S.C. §158(a) 2, 8
29 U.S.C. §158(d) 4, 9
29 U.S. §160(e) and (f) 7

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

LITTON MICROWAVE COOKING PRODUCTS,
DIVISION OF LITTON SYSTEMS, INC.,
(Predecessor to Microwave Products of America, Inc.)
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Litton Microwave Cooking Products, Division of Litton Systems, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on November 12, 1991.

REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (attached herein as Appendix A). The decision and order of the National Labor Relations Board which the Court of Appeals reviewed is reported at 300 NLRB No. 37 (1990) (attached herein as Appendix B).

Relevant portions of the decision of the Administrative Law Judge are set forth in Appendix C.

JURISDICTION

The judgment of the Court of Appeals (attached herein as Appendix D) was entered on November 12, 1991. An order of the Court of Appeals denying a timely petition for rehearing and rejecting a suggestion en banc (attached herein as Appendix E) was filed on December 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant provisions of Section 8 of the National Labor Relations Act provide:

> (a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer . . . .
>
> . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a). 29 USC §158(a).
>
> (d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any

question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute and simultaneously therewith notifies any State or Territorial

> agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . . 29 U.S.C. §158(d).

STATEMENT OF THE CASE

1. Background

Litton operated a microwave cooking products plant in Minneapolis, where its production and maintenance employees were represented by a local of United Electrical, Radio & Machine Workers of America (UE) (the Union). In April of 1977, Litton opened a production plant in Sioux Falls, where it hired employees for about $2 an hour less than it paid its Minneapolis employees. The Union conducted a successful organizing campaign and was certified by the Board on September 19, 1980. Bargaining began almost immediately on October 7, 1980. By February 1, 1982, there had been 53 bargaining meetings but the parties did not reach agreement on a collective bargaining contract. Wages were a major issue. The Union at all times demanded that Litton raise its rates in Sioux Falls about $2 per hour to match the rates it paid its employees in Minneapolis. Litton argued

it would pay rates which were competitive in the Sioux Falls area.

In addition to this major difference, the parties disagreed over the payment of a February, 1981 merit increase while their wage negotiations were in progress. The Union demanded that Litton grant all employees a February, 1981 merit increase as it had done to some, but not all, of its employees in 1978, 1979 and 1980. In those years, Litton had also granted increases to all employees in August, and the Company contended the August increases were in accordance with company policy and the February increases for some, but not all, employees were exceptions to that policy.

At the eighth bargaining session, on November 18, 1980, Litton submitted to the union its initial written proposal offering "annual increases for all bargaining unit employees, to be paid on August 1 of each year." After the twenty-sixth bargaining session, on February 25, 1981, no agreement had been reached on an overall contract or on the payment of a February increase. Thus, there were 19 bargaining sessions held before the end of February, 1981 during which the payment of a February increase could have been discussed, and it was in fact discussed during sessions held on December 9, 1980, January 22 and February 12, 1981. Absent an agreement on its payment, Litton did not institute a February 1981 merit wage increase.

2. Board Proceedings

Based upon unfair labor practice charges filed by the Union, the Board's Regional Director issued consolidated complaints against Litton alleging, for purposes pertinent to this petition, that Litton had bargained in bad faith with the Union over various company

proposals and had also failed to grant a February, 1981 merit wage increase in violation of Section 8(a)(5) of the Act. After a hearing, the Administrative Law Judge (ALJ) found, among other things, that Litton had bargained in bad faith by refusing to agree to the Union's dues check-off proposal and by proposing clauses on waiver, recognition and absentee control, in violation of Section 8(a)(5) of the Act. (App. C8) Therefore, the ALJ concluded, Litton could not have reached a good-faith impasse with the union before it refused to pay the February, 1981 increase, so the refusal to pay the increase also violated Section 8(a)(5) of the Act. (App. C13) As an independent ground, the ALJ also found that Litton provided the Union with inaccurate wage information and that Litton's argument that its policy was to pay wage increases in August only was "created *ad hoc* for the purpose of deluding the Union at the bargaining table," therefore, the refusal to pay the increase was in violation of Section 8(a)(5). (App. C13-14)

Upon exceptions filed to the Administrative Law Judge's Decision, the Board rejected his finding that Litton had bargained in bad faith by not agreeing to the Union's dues check-off proposal and by proposing the Company's three contract proposals. The Board also rejected the findings of the ALJ that Litton had provided inaccurate wage information to the Union and that the August wage increase policy had been created ad hoc to delude the Union. (App. B21-24, incl. fn. 30 and B40-42) The Board, in fact, dismissed all allegations that Litton had bargained in bad faith or had engaged in unlawful "surface bargaining." (App. B26)

However, for some inexplicable reason, or no reason at all, the Board affirmed the finding Litton had violated Section 8(a)(5) of the Act by not granting the February, 1981 merit wage increase. In other words, the Board

specifically rejected all of the bases relied upon by the ALJ to find a Section 8(a)(5) violation in not granting the February, 1981 merit wage increase, but affirmed the finding without offering or even discussing any grounds to support its affirmation of the finding. (App. B26, incl. fn. 34)

3. Court of Appeals Decision

Litton filed a petition for review, and the Board filed a cross-application for enforcement, of the Board's order with the Court of Appeals for the Eighth Circuit. The Court below enforced the Board's order, citing *National Labor Relations Board v. Katz*, 369 U.S. 736 (1962) for the proposition that an employer's unilateral change in conditions of employment under negotiation is an unfair labor practice. According to the Court below, until the parties reach an impasse in negotiations over labor matters, an employer must maintian the status quo as to wages. (App. A3, A6)

4. Basis of Jurisdiction in Court of Appeals

The basis for the jurisdiction of the Court of Appeals is Sections 10(e) and (f) of the National Labor Relations Act. 29 U.S. §160(e) and (f).

ARGUMENT

I.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has rendered a decision which is in conflict with the decision of another United States Court of Appeals. *Nabors Trailers, Inc. (nka Steego Transportation Equipment Centers, Inc.) v. National Labor Relations Board*, 910 F.2d 268 (5th Cir. 1990). On April 29, 1991, this Court issued its order in Case Dkt. 90-1165 granting a writ of certiorari in *National Labor Relations Board v. Nabor Trailers, Inc., (nka Steego Transportation Equipment Centers, Inc.)*

The Court of Appeals has rendered a decision involving a federal question in a way which conflicts with an applicable decision of this Court. *National Labor Relations Board v. Katz*, 369 U.S. 736 (1962).

II.

THERE IS NO OBLIGATION UNDER SECTION 8(a)(5) OF THE NATIONAL LABOR RELATIONS ACT REQUIRING AN EMPLOYER WHICH IS BARGAINING IN GOOD FAITH WITH A UNION OVER WAGES TO NEGOTIATE TO A GOOD-FAITH BARGAINING IMPASSE PRIOR TO IMPLEMENTING ITS WAGE PROPOSAL.

Section 8(a)(5) of the Act, 29 U.S.C. §158(a), requires an employer to bargain collectively with the majority representative chosen by the employees of the

employer. Section 8(d), 29 U.S.C. §158(d), defines the obligation to bargain in terms of meeting at reasonable times and conferring in good faith with respect to wages, hours and other terms and conditions of employment. The statute specifically provides "such obligation does not compel either party to agree to a proposal or require the making of a concession."

The Court of Appeals for the Fifth Circuit has correctly interpreted Sections 8(a)(5) and 8(d) by holding that if an employer notifies the union that it intends to make a change and gives the union an opportunity to bargain about the proposed change, it has fulfilled its obligation and need not bargain to an impasse over the change. *Nabors Trailers, Inc. (nka Steego Transportation Equipment Centers, Inc.) v. National Labor Relations Board*, 910 F.2d 268, 273 (5th Cir. 1990), citing *National Labor Relations Board v. Citizens Hotel Company*, 326 F.2d 501, 505 (5th Cir. 1960). Accord: *National Labor Relations Board v. Laney & Duke Storage Warehouse Co.*, 424 F.2d 109, 112 (5th Cir. 1970). This Court issued an order granting a writ of certiorari in *Nabors Trailers* on the basis of a petition filed by the National Labor Relations Board. Case Dkt. 90-1165. The Court below, and the Courts of Appeals for the First, Second, Third, Fourth, Sixth and Ninth Circuit have held to the contrary, thereby giving unions a veto power over the ability of an employer to change working conditions even though the employer has complied with the requirements of Sections 8(a)(5) and 8(d) of the Act by bargaining in good faith with the union over a proposed change. *National Labor Relations Board v. U. S. Sonics Corporation*, 312 F.2d 610 (1st Cir. 1963), *Carpenter Sprinkler Corporation v. National Labor Relations Board*, 605 F.2d 60 (2d Cir. 1979), *Industrial Union of Marine & Shipbuilders Workers of*

America v. National Labor Relations Board, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964), *Cone Mills Corporation v. National Labor Relations Board*, 413 F.2d 445 (4th Cir. 1969), *National Labor Relations Board v. H. & H. Pretzel Company*, 831 F.2d 650 (6th Cir. 1987), *Richmond Recording Corp. v. National Labor Relations Board*, 836 F.2d 289 (7th Cir. 1987), *National Labor Relations Board v. Auto Fast Freight, Inc.*, 793 F.2d 1126 (9th Cir. 1986).

The petition should be granted in order to resolve this conflict between the Courts of Appeals for the various circuits. As indicated by the number of cases which have reached the Courts of Appeals on this issue, this is a matter of importance and a mine with a rich vein of litigation. Indeed, the Board predicated its petition for a writ of certiorari in *Nabors Trailers* on this same point.[1]

Additional confusion is added to the picture because the Board has a long-standing principle that in the context of good-faith bargaining, an employer may withhold a wage increase during negotiations and condition the granting of wage increases on reaching a final contract settlement. *Shell Oil Company, Inc.*, 77 NLRB 1306, 1310 (1948), *B.F. Goodrich Company*, 195 NLRB 914 (1972), *American Telecommunications Corporation*, 249 NLRB 1135 (1980), *Winn-Dixie Raleigh, Inc.*, 267 NLRB 231, 235-236 (1983), (where the Board found that the employer did not violate the Act by discontinuing its past practice of granting annual raises to its employees while it bargained in good faith for an initial contract).

---

[1] Petitioner herein has been advised that the parties in *Nabors Trailers* have settled the case and the petition for certiorari has been dismissed. Therefore, it is important that the petition in the instant case be granted so the question which the Board so earnestly sought to have this Court resolve can in fact be resolved.

III.

NATIONAL LABOR RELATIONS BOARD V. KATZ, 369 U.S. 736 (1962) DOES NOT REQUIRE AN EMPLOYER WHICH IS BARGAINING IN GOOD FAITH WITH A UNION OVER AN INITIAL CONTRACT TO PAY DISCRETIONARY MERIT INCREASES; ON THE CONTRARY, *KATZ* PROHIBITS SUCH PAYMENTS.

The Court below held that an employer must bargain to impasse before implementing a unilateral change in wages. (App. A3) Petitioner submits *Katz* does not go that far and is limited by the facts in that case. In *Katz*, while bargaining for an initial contract, the employer, "without having advised or consulted with the union, . . . announced a new system of automatic wage increases . . . and a merit review every six months for employees . . ." The automatic wage increase system which was instituted was considerably more generous than that which had been proposed to the union. 369 U.S. at 745. Under these circumstances, the *Katz* Court correctly found the employer had engaged in bad-faith bargaining. Here, however, the employer did not institute a unilateral change in wages without first notifying and consulting with the union. Indeed, the ALJ specifically found the union was notified of the proposed "change" on November 18, 1980, and the parties negotiated over the proposal on three occasions before the end of February, 1981. (App. C2-6) This case is very different from *Katz* and the Court below extended *Katz* far beyond its holding in enforcing the Board's order. In *Katz*, this Court did not hold that the Union has a veto power over a proposed change where the employer bargains in good

faith, notifies the union of the proposed change and affords it ample opportunity to negotiate over the proposal before implementing it.

One of the employer's actions in *Katz* related to merit increases. There, the employer unilaterally instituted merit increases for 20 of the 50 bargaining unit employees "without notice to the union." 369 U.S. at 746. The *Katz* Court held the employer's action "as tantamount to an outright refusal to negotiate on that subject . . . unless the fact that the January raises were in line with the company's long-standing practice of granting quarterly or semi-annual merit reviews — in effect, were a mere continuation of the status quo . . ." 369 U.S. at 746. But, the *Katz* Court concluded, the merit increases were not automatic increases to which the employer had already committed because "they were informed by a large measure of discretion." 369 U.S. at 786. Thus, in *Katz*, this Court held the employer violated Section 8(a)(5) of the Act by granting merit increases without prior notice to the union. Here, the Court below held Litton violated Section 8(a)(5) of the Act because it did not unilaterally grant what the Court below acknowledged to be "merit increases." (App. A5-6)

Finally, in *Katz*, this Court held "we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action . . ." 369 U.S. at 748. It is undisputed that in this case Litton bargained in good faith for 53 bargaining sessions conducted between October 7, 1980 and February 19, 1982. The Board so found. (App. B2-3, B21-23) It is undisputed that on November 18, 1980, Litton made a proposal to the Union that wage increases be given in August only and that the parties discussed the issue on three occasions before the end of February, 1981, and the Union had the opportunity to

negotiate with respect to the proposal on 19 occasions before the end of February, 1981. (App. C2-6) It would thus appear that when February ended and no agreement had been reached, an impasse, in fact, automatically occurred. When the limited time for resolution of the February merit wage increase issue expired without an agreement, the parties had exhausted the prospects of an agreement on the issue and an impasse, if required (and petitioner does not concede one is required) existed.

In any event, petitioner submits the Court below extended the holding in *Katz* far beyond the intent of the *Katz* Court and has in fact held Litton violated Section 8(a)(5) of the Act for not doing something which the *Katz* Court held was unlawful to do under Section 8(a)(5) of the Act.

CONCLUSION

The impasse questions presented by this petition concern issues which are important to employers, unions and employees and arise frequently. The Board itself strenuously argues this point in its petition for certiorari (pages 14-15) and reply brief (page 7) in *National Labor Relations Board v. Nabors Trailers, Inc. (nka Steego Transportation Equipment Centers, Inc.)*, Case Dkt. 90-1165.

This petition should be granted because the opinion of the Court below is a litigation generator, often raising related issues. By requiring proof of a good-faith impasse, the decision below opens up the "impasse" issue. Impasse cases are difficult, costly and time-consuming, usually involving an analysis of the subjective intent of the parties and lengthy records of bargaining proposals and meetings. *Taft Broadcasting Co.* 163 NLRB 475 (1967), *E. I. DuPont & Co.*, 268 NLRB 1075 (1984),

Saunders House, 265 NLRB 1632 (1982), *rev'd*, 719 F.2d 683 (3rd Cir. 1983), *Sierra Publishing*, 291 NLRB No. 84 (1988).

In addition, impasse cases frequently involve the issue of the employer's obligation to provide the union with relevant information in a timely fashion which enables unions to utilize information requests as tools of delay. *See Dependable Building Maintenance Co.*, 274 NLRB 216 (1985), *Owens-Corning Fiberglass Corp.*, 282 NLRB 609 (1987), *Alpha Biochemical Corp.*, 293 NLRB No. 92 (1989), *Excelsior Pet Products, Inc.*, 276 NLRB 759 (1985), *Association of D. C. Liquor Wholesalers*, 292 NLRB No. 132 (1988), *Valley Mould*, 288 NLRB 1015 (1988).

This petition should be granted to enable the Court to determine if the requirements of Sections 8(a)(5) and 8(d) vary depending upon whether the employer has implemented a wage reduction, or increased wages, or, as in this case, has done nothing.

Section 8(d) of the National Labor Relations Act was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements. Here, contrary to the intent of Congress, the Court below has enforced a Board order impermissibly requiring Litton to agree to the Union's demand for a February wage increase. *H. K. Porter v. National Labor Relations Board*, 397 U.S. 99, 109 (1970).

Contrary to the holding of the Court below, Congress did not intend for unions to have a veto power over management decisions. Contrary to the holding of the Court below, Congress had no expectation unions would be equal partners with management in the running of their business enterprises. Contrary to the holding of the Court below, our collective bargaining scheme does not include the principle of codetermination. *First National*

Maintenance Corp. v. National Labor Relations Board, 452 U.S. 666, 676 (1981). Contrary to the holding of the Court below, Section 8(d) of the Act was adopted by Congress in an attempt to thwart Board forays into the collective bargaining arena, not bless them.

For the foregoing reasons, the petition should be granted.

Dated: January 28, 1992.

Respectfully submitted,

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CARPENTER, BENNETT
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FRANCIS X. DEE

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2813

Litton Microwave Cooking Products,
Division of Litton Systems, Inc.
(predecessor to Microwave Products
of America, Inc.),

Petitioner,

v.

National Labor Relations Board,

Respondent.

United Electrical, Radio and Machine
Workers of America,

Intervenors.

Petition for Review of the
National Labor Relations Board

Submitted: May 15, 1991
Filed: November 12, 1991

Before FAGG, Circuit Judge, HENLEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

WOLLMAN, Circuit Judge.

Litton Microwave Cooking Products, Inc. appeals from the decision and order of the National Labor Relations Board; the Board cross appeals for enforcement of its order. We affirm and order enforcement of the Board's decision.

I.

Litton Microwave Cooking Products, Inc. (Litton) opened a plant in Sioux Falls, South Dakota, in April of 1977. Shortly thereafter, the employees organized, and the National Labor Relations Board (Board) certified United Electrical, Radio and Machine Workers of America (Union) as the exclusive representative of the employees in the bargaining unit. Litton and the Union began bargaining over an initial contract in October 1980 and completed fifty-three negotiating sessions. Although the parties continued to meet through February 1982, the Board found that they had reached impasse on July 30, 1981.

The Union filed charges with the Board, alleging numerous violations of the National Labor-Management Relations Act (NLRMA). An administrative law judge (ALJ) found some violations on the part of Litton, dismissed other allegations, and made a comprehensive order setting out his findings of fact and conclusions of law. The Board adopted portions of the ALJ's findings, rejected other portions, and issued its decision and order. Specifically, the Board found that Litton had committed unfair labor practices prohibited by section 8(a)(5), (3) and (1) of the NLRMA (29 U.S.C. § 158 (a)(5), (3) and (1) (1973)).

Litton raises three issues in this appeal. It claims that: there is not substantial evidence on the record as a whole to support the finding that Litton had violated section 8(a)(5) and (1) by failing to grant an extra paid one-half hour lunch period before Christmas in 1981; there is not substantial evidence to support the finding that Litton had violated section 8(a)(5) and (1) by failing to grant a February 1981 wage increase; and the six-year period between the filing of all briefs and the issuance of

the Board's decision is an inordinate delay warranting denial of enforcement of the Board's order.

II.

An employer must bargain collectively with its represented employees "with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158 (d) (1973 and Supp. 1991). It is an unfair labor practice to refuse to bargain collectively. 29 U.S.C. § 158(a)(5). The Board and the courts have long recognized that an employer's unilateral change in conditions of employment under negotiation is an unfair labor practice, "for it is a circumvention of the duty to negotiate which frustrates the objectives of section 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Thus, until parties reach impasse in negotiations over labor matters, an employer must "maintain the status quo as to wages and working conditions." *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981); *see also Powell v. National Football League*, 930 F.2d 1293, 1300 (8th Cir. 1989), *cert. denied*, 111 S.Ct. 711 (1991).

We will enforce an order of the National Labor Relations Board if it has correctly applied the law and if substantial evidence in the record supports its findings. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *see also Hall v. NLRB*, 941 F.2d 684, 687-88 (8th Cir. 1991); *NLRB v. American Postal Workers Union, St. Louis, Mo.*, 618 F.2d 1249, 1254 (8th Cir. 1980).

III.

Litton first claims that there is not substantial evidence to support a finding that it violated the NLRMA by not granting an extra paid one-half hour lunch period before Christmas of 1981. Just before Thanksgiving of 1977 and 1978, Litton had given its employees a one hour lunch period rather than the usual one-half hour; the extra one-half hour was paid time. In 1979 and 1980, it did the same just before Christmas. In December 1981, the Union's chief steward asked his immediate supervisor whether Litton intended to discontinue the holiday lunch period. She replied that there would be no extra lunch period. The steward then approached Litton's manager of human resources, who told the steward that he had not considered the matter. Later that day he sent a letter to the steward saying that Litton would allow only the normal lunch period. The two met at the end of the workday to discuss the lunch period, and the manager stated that Litton felt it was an inappropriate time, given the economic conditions, to grant extra paid time to the employees.

Despite Litton's claim that it bargained with the Union over this matter, the ALJ found that the supervisor's initial statement to the steward that there would be no holiday lunch demonstrated that Litton had decided to discontinue the practice before the Union ever approached the company. The Board found that the practice of giving an extended holiday lunch period was a condition of employment and adopted the ALJ's finding that Litton had failed to bargain with the Union over its discontinuance.

A benefit is a condition of employment when it is "so tied to the remuneration which employees receive[] for their work that [it is] in fact a part of it." *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 213 (8th Cir.

1965). A gift, however, is not a condition of employment. *Id.* The Board concluded in this case that because Litton had instituted the extended holiday lunch period during the first year of the plant's operation and had maintained the practice continuously during the next three years, it was a condition of employment rather than a gift. The employees had reasonably anticipated its continuation and immediately approached the company when they heard about its discontinuance.

Where either of two inferences may reasonably be drawn from the facts, and the Board finds one of the inferences to be true, we are bound by the Board's finding even if the court would have made a different choice were the matter before us *de novo*. *See Radio Officers Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 49-52 (1954); *Hall*, 941 F.2d at 688; *American Postal Workers Union*, 618 F.2d at 1254. Although there is evidence to suggest that the extra holiday lunch period was a gift, we cannot say the Board's finding that the practice had become a condition of employment was unreasonable.

Additionally, the Board found that Litton had refused to bargain with the Union concerning the holiday lunch period, having already decided to discontinue the practice. Ample evidence in the record supports the Board's finding in this regard.

Litton next claims that there is not substantial evidence to support a finding that it violated the NLRMA by not granting a merit increase in February of 1981. From August of 1977 through 1980, Litton had granted wage increases twice a year. It described the increases through the end of 1979 as minimum and maximum merit increases. The minimum increases were given to all covered employees; receiving the maximum increase depended on certain discretionary factors. The February 1980 increase was partially merit increase and partially

nonmerit increase. Nonmerit increases were given in August 1980 and 1981, and no increase was given in February 1981.

The Board found that the February merit increases were a part of wages because they had become a practice of the company and that Litton never bargained over discontinuance of the increase. Litton counters with three arguments. First, it claims that it never had a policy of February increases and that the February increases were exceptions to the usual policy of once-a-year August increases. Next, Litton maintains that it did bargain with the Union over the February increase. Last, Litton argues that it could not have granted a February merit increase because doing so would have been a unilateral change in wages imposed before reaching impasse.

Because employers may not unilaterally change conditions of employment, "[a]n employer with a past history of a merit increase program neither may discontinue that program . . . nor . . . continue to unilaterally exercise his discretion with respect to such increases." *Oneita Knitting Mills*, 205 N.L.R.B. 500, ___ n.1 (1973) (citing *Katz*, 369 U.S. 736). Instead, the employer must maintain the general outline of the program and consult the bargaining agent about implementation of the program. *Id.*

Litton had given merit increases in January or February of each year since the plant was opened. It notified employees about the program of increases via the employee handbook and notices posted in the plant. In 1981 it simply discontinued the February increases, maintaining that it had never established a practice of giving the increases. We find substantial evidence in the record to support the Board's position that the February increase was Litton's practice and that Litton never bargained about the 1981 February merit increase.

Last, Litton asks this court to deny enforcement of the Board's order because of the inordinate delay between the filing of all the briefs noting exceptions to the ALJ's decision and the Board's issuance of its order. The ALJ issued his decision in 1984, all briefs noting exceptions to the decision were filed soon after, and the Board finally issued its decision and order in 1990.

Litton argues that ordering enforcement ten years after the violations took place would serve no useful purpose. We do not hesitate to deny enforcement of dilatory Board orders. *See, e.g., NLRB v. Mountain Country Food Store, Inc.*, 931 F.2d 21, 22-23 (8th Cir. 1991) (chiding the Board for its "sloth-like pace" in issuing its order). The Board has a statutory duty to conclude proceedings "within a reasonable time." 5 U.S.C. § 555(b) (1977). It may be compelled to act if its actions are "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (1977).

The Board claims, however, and we agree, that the question involved in deciding whether to enforce a delayed order is whether passage of time "has so changed the underlying situation . . . that enforcement of the order now not only would undermine more labor policies that (sic) it would advance, but also would mock reality." *Emhart Indus., Hartford Div. v. NLRB*, 907 F.2d 372, 379-80 (2d Cir. 1990).

We do not believe that the underlying situation had so changed that it would mock reality to enforce the Board's order. While Litton itself no longer owns the plant, a different division of the parent corporation does. No collective bargaining agreement has ever been reached. We see no reason for the employer to benefit from the Board's delay, inexcusable as it is.

Accordingly, we affirm the decision of the Board and order its enforcement.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

300 NLRB No. 37
SDO

D--1540
Sioux Falls, SD

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR
RELATIONS BOARD

LITTON MICROWAVE COOKING PRODUCTS,
DIVISION OF LITTON SYSTEMS, INC.

and

UNITED ELECTRICAL, RADIO AND
MACHINE WORKERS OF AMERICA (UE)

Cases 18--CA--7065
18--CA--7325
18--CA--7402
18--CA--7537

DECISION AND ORDER

On March 12, 1984, Administrative Law Judge David L. Evans issued the attached decision. The Respondent and the General Counsel each filed exceptions and a supporting brief; the Charging Party filed cross-exceptions and a supporting brief. The Respondent filed an answering brief to the Charging Party's cross-exceptions and the General Counsel's exceptions; the General Counsel and the Charging Party each filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

The Respondent manufactures microwave countertop ovens at its Sioux Falls, South Dakota plant. Its production and maintenance employees had been represented by the Union since September 19, 1980,[3] when it was certified pursuant to a Board election conducted September 11, 1980. As of the date of the hearing in this proceeding, the Union and the Respondent had yet to negotiate a contract concerning the Sioux Falls employees. The instant complaint alleges that the Respondent violated Section 8(a)(5) and (1) during its initial contract negotiations with the Charging Party commencing October 7, 1980. The complaint also alleges violations of Section 8(a)(3) and independent violations of Section 8(a)(1) during the 17-month period of negotiations.

The judge found numerous violations of Section 8(a)(5), (3), and (1) of the Act and dismissed other allegations. For reasons discussed below, we are not in full agreement with all these findings. Most significantly, we disagree with the judge's finding that the Respondent during the 53 session, 17-month-long course

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[1] The General Counsel and the Union have each excepted to the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Charging Party's request for atttorney's fees and payment to its negotiators is denied.

[3] The judge inadvertently stated the certification occurred in 1981.

of negotiations engaged in surface bargaining in violation of Section 8(a)(5) and (1).

I. 8(a)(1) Allegations

The judge found that the Respondent violated Section 8(a)(1) by the actions described below. We agree with these findings for the following reasons.

1. The judge found that the Respondent violated Section 8(a)(1) when Supervisor Jackie Moeller, 2 weeks before the election, told employee Mark Hubert, "I hear you have been talking to people on company time and I respect your right to talk to people about the Union but don't do it on company time."

The judge reasoned that the proscription about talking on "company time" was overly broad because the employees received two paid breaks per day. He further found that Moeller's statement constituted a discriminatory no-solicitation rule because undisputed testimony showed that employees were otherwise permitted to talk about anything during working time.

We agree that the statement was a discriminatory rule and on that basis adopt the judge's finding that Section 8(a)(1) was violated. We further agree that Moeller's proscription was overly broad. See *Hoyt Water Heating Co.*, 282 NLRB 1348, 1357 (1987), and cases cited therein, holding that "company time" could reasonably be construed as encompassing both working and nonworking time spent on the company premises.

2. The judge found that Supervisor Roger Kozel unlawfully interrogated employee Silvia Dunkelberger in August 1980. He found that at the end of a performance review discussion in Kozel's office, Kozel told Dunkelberger that he would like to talk about the Union, that he wanted Dunkelberger to give her views, and that Kozel

would then give his. Dunkelberger indicated she would rather not, but after Kozel repeated his request three times, she relented and related several employee complaints about terms and conditions of employment. Kozel then told them about several negative experiences he had had with unions. Dunkelberger was an active union supporter who eventually was the first president of the local involved here, Local 1180.

Subsequent to the judge's decision, the Board issued its decision in *Rossmore House*,[4] in which it reaffirmed the "totality of the circumstances" test to determine whether interrogations of employees are unlawful. Applying that test, we agree with the judge that Kozel's interrogation of Dunkelberger violated Section 8(a)(1) of the Act. Thus, the interrogation was conducted in Kozel's office at the end of a performance review discussion and Kozel persistently urged Dunkelberger to express her views about the Union in spite of the fact that Dunkelberger told him that she would rather not talk about the Union. In these circumstances, Kozel's questioning cannot be viewed as the normal sort of interchange that can be expected in the workplace and "the place and method of interrogation"[5] in this case both render the interrogation unlawful. Instead, Kozel's comments had a tendency to interfere with the employee's Section 7 rights.

3. The judge found that again in November 1980 the Respondent violated Section 8(a)(1) when Supervisor Judy Klaus directed employees not to talk about the Union in work areas and threatened disciplinary action if

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[4] 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[5] Ibid., 269 NLRB at fn. 20. See also *Baptist Medical System*, 288 NLRB 882 at fn. 2 (May 10, 1988) (questioning of known union supporter in supervisor's office coercive).

they did so. He found that group leader Judy Jungen and the other employees on the "white line" talked regularly about any topic while working on the line. in late November, however, Klaus told Jungen and two other group leaders that "she knew the Union was being talked about on the line" and "she wanted it to stop or that disciplinary action would result." The three group leaders relayed the message to other employees, with Jungen herself telling 10 employees.

The judge found that Klaus' instruction was overly broad, and, coupled with the warning of discipline, violated Section 8(a)(1). We find that Klaus' instruction was discriminatory because talk on other topics while employees were working was tolerated. On this ground, we agree with the judge's conclusion that the instruction and warning violated Section 8(a)(1). In so doing, we find it unnecessary to rule on whether the rule pronounced was overly broad.

4. The complaint alleged that the Respondent violated Section 8(a)(1) on two occasions by threatening employees with discharge for leafleting in the lobby of the Respondent's plant 45 minutes before starting time, and by its chief negotiator Mathias Diederich's threatening employees on April 8, 1981, with suspension if leafleting in the lobby continued. The judge dismissed these allegations because he found that the lobby was a work area for the guards between 6:30 and 7 a.m., just before the first shift started. (The Charging Party's exception to the dismissal of the allegation concerns only the April 8 statement.) We agree with the judge's conclusion.

The uncontroverted evidence shows that the lobby is a relatively small area no wider that the two doors on each side through which all the employees (approximately 580) pass on their way to work. During the half hour before work begins, the guards stationed in the lobby

check badges, issue temporary badges, answer telephone calls from employees calling in sick, and check for employees with obvious physical injuries. According to the undisputed testimony of Security Supervisor Wibbin, on January 28, 1981, when the first incident of union leafleting occurred, employees entering the lobby stopped to read and talk about the leaflets there. Because of the noise level, Wibbin had difficulty performing his duty of answering telephone calls of employees reporting that they would be absent because of illness. There is evidence, therefore, that the leafleting not only had the potential to interfere, but also actually did interfere, with the guards' work.

Diederich's April 8 statement threatening suspension for further leafleting in the lobby was clearly directed to leafleting occurring at the time when the lobby was a work area for guards. Not only did the two incidents of leafleting occur at this time of day, but also there is no evidence that the Union attempted to leaflet in the lobby at any other time of day. We therefore conclude that the judge correctly found that Diederich's statement was not unlawful.

II. 8(a)(3) and (1) Allegations

The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) by issuing warning notices to employees Judy Lawson, Mark Hubert, and John Hassara on April 21, 1981, and further warning letters to Lawson and Hubert on April 22, to the extent these second warning letters disciplined Lawson and Hubert for their disregard of the instructions of the secretary to Director of Operations Michael Dolen to wait before entering his office.

These three employees had gone with other employees into Director of Operations Michael Dolen's office

during their break on April 21 to protest certain terms and conditions of their employment and the lack of progress in negotiations. When the buzzer sounded, indicating that the break would end in 2 minutes, all the employees but these three went back to work. The three remained and talked with Dolen and Materials Manager Richard Ori for several minutes after the break had ended. They returned to work after Ori asked if they were not supposed to be at work. Dolen later informed Production Superintendent Lorie Johnson that he had not approved the three employees' late return from lunch. At Dolen's instruction, the three employees received warning notices and were docked for their 14 minutes time off. On April 22, the Respondent issued second warning letters to Lawson and Hubert for disregarding the instructions of Dolen's secretary on April 21 to wait before entering his office and for their refusal to correct their timecards to show the 14 minutes past their break period when they continued to speak to Dolen and Ori.

The judge found that by continuing the conversation with the three employees after the warning buzzer, without indicating that their staying was impermissible, Dolen was creating a "set up" for the employees to be disciplined. He concluded that the initial warnings, therefore, violated Section 8(a)(3) and (1). He further reasoned that the employees, by not returning to work at the end of their lunchbreak, were withholding labor in protest of working conditions and, thereby, engaging in strike activity protected by Section 7. Citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 10--17 (1982), he concluded the Respondent's discipline of the employees for this conduct violated Section 8(a)(1) on this basis as well.

We agree with the judge that the initial warnings violated Section 8(a)(3) and (1). In agreeing, we find that Dolen's conduct at the April 21 meeting is more

accurately described as a condonation of the employees' late returns from lunch than as a "set up." The discussion did not involve personal matters and Dolen's acquiescence in their staying beyond the buzzer was tantamount to his giving them permission not to report back to work as long as their conversation with him lasted. The situation is, therefore, distinguishable from a strike, which does not involve employer condonation or participation. We, accordingly, do not rely on the judge's alternative basis for finding a violation that the employees were involved in strike conduct, or on his reliance on *NLRB v. Washington Aluminum Co.*, supra.

The judge further found that although the Respondent could not lawfully punish the employees for their late returns, it could require that they receive no pay for the time spent in exercising their Section 7 rights. He, therefore, concluded that the Respondent did not violate Section 8(a)(3) and (1) to the extent that the second warning notices to employees Hubert and Lawson disciplined them for refusing to correct their timecards to show the time spent in conversations with Dolen and Ori. We disagree. As found above, Dolen in effect gave the two employees permission to stay past the end of the break period to continue the discussion with him. Further, because employer condonation or participation is involved, the employees' conduct did not amount to a strike. In these circumstances, we find that they were entitled to be paid for the time they spent in conversing with Dolen. The Respondent's further discipline of Hubert and Lawson for their failure to correct their timecards to forfeit payment for any time of their discussion with Dolen, therefore, also violated Section 8(a)(3) and (1).

III. 8(a)(5) and(1) Allegations

A. The Allegation of Bad-Faith Bargaining

The judge found that since November 18, 1980, the Respondent engaged in an overall pattern of conduct designed to frustrate the bargaining process, thereby violating Section 8(a)(5) and (1) of the Act. He further found that, although the Respondent engaged in extensive bargaining on most issues in dispute between the parties for which no independent evidence of bad-faith bargaining exists,[6] the Respondent's bad faith concerning the topics of checkoff, the zipper clause, the absence control program, and the recognition clause indicated that it was seeking to frustrate the bargaining process. His basis for finding bad-faith bargaining on these

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[6] The Respondent thus dismissed allegations that the Respondent specifically engaged in bad-faith bargaining with regard to these negotiation topics: management rights, grievance procedure and arbitration, seniority, recognition of the Union's local, hours of work, holidays, union leave of absence, bulletin board, duration, the "takeaway" provisions proposed by the Respondent, supply-and-demand wage bargaining, delayed benefit coverage, voluntary layoffs, equal distribution of overtime, and reinstatement rights. We find no merit to the General Counsel's or the Charging Party's exceptions with respect to the first five of these topics. As for the subsequent topics, no exceptions were filed.

In adopting the judge's dismissal of the allegation of bad-faith bargaining on management rights, we note that the judge erroneously stated that the union did not object to the Respondent's proposal on the basis that it was overbroad. However, we find this error nonprejudicial given the other grounds for dismissal. Further, in adopting the judge's dismissal of the allegation of bad-faith bargaining on hours or work, we disavow the judge's statement that the Respondent's stated reason for wanting to retain its control of the shift hours or to avert traffic jams in a large industrial park with limited access and egress was a sham. The record does not indicate that the Respondent's concern was merely hypothetical.

specific topics is discussed in greater detail below. As further evidence of bad-faith bargaining, the judge relied on what he found to be the false reason the Respondent provided for its refusal to provide a wage increase in February 1981. He concluded that the Respondent had bargained in bad faith since at least November 18, 1980. It was on this date that the Respondent rejected the Union's proposal for checkoff,[7] the earliest action by the Respondent on those topics concerning which the judge found bad-faith bargaining.[8]

The Respondent excepts to the judge's analysis of its conduct during negotiations. We find merit in the Respondent's exceptions. For the reasons explained

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[7] The judge erroneously noted that the Respondent rejected the Union's proposal for checkoff with a "a close-minded hostility revealed by the counterproposed punishment of any employee who attempted to collect dues in other ways." What the Respondent counterproposed was that employees would be disciplined for collecting dues during "working time." This would merely protect the Respondent's legitimate interest in preserving "working time" for business purposes and would not, as described by the judge, penalize employees for collecting dues in all other possible ways.

[8] The judge found that the Union engaged in bad-faith bargaining on the issues of recognition and work rules and by its repudiation of an agreement on the discharge of probationary employees. He found no merit to the Respondent's contentions that the Union also engaged in bad-faith bargaining on the subjects of union security, the "floater holiday," and superseniority and by repudiations of other agreements. However, he concluded that the Union's misconduct did not exonerate the Respondent from its duty to bargain, nor lessen the need for a bargaining order. Because we dismiss the allegation that the Respondent violated Sec. 8(a)(5) and (1) by surface bargaining, we find it unnecessary for the most part to pass on the judge's discussion of what he deemed to be misconduct by the Union. Thus, for reasons, explained below, we have considered the Union's bargaining conduct only on certain topics and only as relevant to whether the Respondent bargained in good faith on the identical topics.

below, we disagree with the judge's analysis of the Respondent's bargaining on the four topics concerning which he specifically found bad-faith bargaining. In considering these topics, we stress that our examination of the Respondent's bargaining positions and proposals relates to whether they indicate an intention by the Respondent to avoid reaching an agreement; it is *not* a subjective evaluation of their content.[9] We stress further that, in dismissing the allegations that the Respondent violated Section 8(a)(5) and (1) by its bargaining conduct, we are relying on the totality of the Respondent's bargaining conduct.[10] Thus, as discussed below, the Respondent's bargaining on these topics must be examined in the context of the Respondent's frequent (53) meetings with the Union, its extensive explanations for its positions and extensive examination of the Union's proposals, its agreement with the Union on at least 23 topics, its numerous significant concessions,[11] and the absence of evidence that it procedurally tried to frustrate the bargaining process. Further, although we have adopted some of the judge's findings that the Respondent engaged in acts of misconduct away from the bargaining table, these are not sufficient, as discussed below, either to warrant a finding of overall bad-faith bargaining or to taint the Respondent's bargaining positions on the four topics discussed below with an unlawful intent of frustrating agreement.

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9 See *Reichold Chemicals*, 288 NLRB 69 (1988).

10 See, e.g., *Tritac Corp.*, 286 NLRB 522, 523 (1987); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1601 (1984).

11 See fn. 27, below.

1. The "Zipper" Clause

The judge found that on January 9, 1981, the Respondent proposed a scope of agreement or "zipper" clause and thereafter refused to modify the proposal despite repeated objections by the Union.[12] He further found that section 2 of the proposed clause contained "unprecedented" language that sought concessions from the Union beyond those usually included in clauses of this type. That is, he found that section 2 would force a party not only to abandon all rights to negotiate during the term of the contract, but also to waive other rights guaranteed by the Act and by other Federal or state statutes. In support of his findings, he interpreted testimony of the Respondent's chief negotiator, Mathias Diederich, as indicating that the Respondent would use the zipper clause to require the Union to waive any statutory right. On this basis, he found the insistence on the proposal a per se violation of Section 8(a)(5) and (1).

In its exceptions, the Respondent contends, inter alia, that the judge's finding that it insisted on its initial proposal was factually inaccurate in that the Respondent had added section 3, a savings clause,[13] on April 9,

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[12] The full text of the proposal is set out in sec. III, D, 1, b of the judge's decision under the subheading of "Bargaining Session No. 18; January 22, 1981."

[13] The saving clause states:

> Section 3. Should any provision of this agreement be declared invalid by any competent court or other governmental authority, the remaining provisions shall remain in full force and effect. Should there be any conflict between any provision of this agreement and any agreement settling or conciliating any charge or complaint filed with any governmental agency, the terms of the settlement or conciliation agreement shall prevail, provided that prior to executing any such agreement, the

(continued)

1981, and it had expressed willingness to agree to a zipper clause not containing section 2. The Respondent further argues that the judge's finding that the proposed zipper clause was unreasonable was based on a misinterpretation of Diederich's testimony and that his testimony in fact indicated that the Respondent did not intend the zipper clause to require the Union to waive all rights under the Act and other statutes and that it so advised the Union during negotiations. Further, the Respondent argues that the Union never inquired during negotiations whether section 2 would cover statutory claims or objected to its inclusion on that basis.

We agree with the Respondent. At the outset, we note that the judge made a factual error by omitting the April 9 modifications. We also note that undisputed testimony indicates that the Respondent did not insist on the inclusion of section 2, but, as noted by the judge, told the Union that it was willing to agree to the "Mastic" clause, a zipper clause that did not include a section 2. Thus, we cannot agree that the Respondent refused to modify its position on the zipper clause throughout negotiations.

Moreover, even assuming arguendo that the two-paragraph, proposed zipper clause that the judge found unlawful facially supports his reading of it, we cannot agree with the judge's finding that Diederich's explanation of the clause, quoted at footnote 94 of his decision, indicated that the Union would have to waive its rights under any and all statutes. Diederich testified that he had in mind

> the normal case [where] a matter comes up in collective bargaining . . . . [T]he Board says the

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(fn. continued)

> Company will meet with the Union to discuss the charge or complaint and agreement and attempt to obtain the Union's ratification of such agreement.

> clause [is] inadequate. Then, in that case, the other party who was claiming the benefit of this zipper clause would have the right to . . . say "we would like a clear, concise waiver from you of this item."

In our view, this testimony indicates that Diederich was simply seeking an effective, but not necessarily unconventional, zipper clause. Our interpretation is particularly plausible in light of the testimony that Diederich expressed willingness to agree to the "Mastic" clause, and further testimony, also referenced by the judge, that Diederich informed the Union that the Respondent's goal was a clause acknowledging that the agreement superseded all past practices and other agreements, and the fact that the Union's objections to the clause were to the necessity of the scope-of-agreement clause per se and not to the possible waiver of all statutory rights.

Thus, we find nothing indicating bad faith in the course of the Respondents bargaining concerning this clause.

2. Checkoff

The judge found that the Respondent's conduct in bargaining over the Union's proposed checkoff provision indicated bad faith because the reasons the Respondent provided for not agreeing with the Union's proposal were a "sham." He also concluded that Diederich's assertion at the December 11, 1980 negotiating session that the Respondent also wanted a rule prohibiting employees from collecting dues on working time demonstrated an inflexible position to which the Respondent adhered throughout negotiations. We disagree with each of the judge's conclusions.

It is settled that an employer is not required to accede to a union's demand for checkoff.[14] Here, the evidence simply does not reveal that the Respondent's bargaining on checkoff was designed to prevent an agreement being reached. That the Respondent never refused to discuss checkoff but was willing to discuss it every time the Union brought up the subject is clear on the record.[15] Further, the Respondent's comments on checkoff during bargaining were substantive, not perfunctory. Thus, Diederich asked how often the Union wanted (checkoff) dues collected and who would absorb the cost. He also pointed out to the Union during bargaining that checkoff had been provided at another of the Respondent's facilities in exchange for some concession by the Union, thereby indicating that the Respondent was not foreclosing such an exchange here. We also note that the Union's bargaining position on checkoff was no less adamant than the Respondent's.[16] The Union never varied its proposal and never indicated a willingness to give a concession in exchange for checkoff. Further, the Union advanced only one reason for its proposal — efficiency.[17]

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[14] See *Tritac Corp.*, supra, 286 NLRB at 523; *American Thread Corp.*, 274 NLRB 1112, 1112 (1985); *McLane Co.*, 166 NLRB 1036 fn. 2 (1967), enfd. 405 F.2d 483 (5th Cir. 1968).

[15] According to testimony, credited by the judge, checkoff was discussed at these negotiation sessions: November 6 and December 11, 1980, April 15 and May 14, 1981, and February 19, 1982.

[16] See *Raybestos-Manhattan, Inc.*, 168 NLRB 396, 410 (1967), where an employer's alleged bad-faith bargaining on checkoff was considered in the context of the union's "fixed and adamant attitude."

[17] Contrast *Stevenson Brick & Block Co.*, 160 NLRB 198 (1966) (the union's offer to provide clerical assistance to collect the union dues and the employer's refusal to countenance such proposal contributed to finding of bad faith). See also *McGraw-Edison Co.*,

(continued)

Accordingly, under all the circumstances, we find that the General Counsel failed to establish that the Respondent engaged in bad faith bargaining on checkoff.

3. The absence control program

The Respondent proposed a provision to discourage absenteeism based on a point system. Employees would receive one point for an absence and one-half point for tardiness. Points would be subtracted from an employee's attendance record for each 4-week period of perfect attendance.[18]

(fn. continued)
172 NLRB 1604, 1609 (1968) (union made identical proposals).

[18] This proposal was first made January 8, 1981, and subsequent to revisions dated April 7 and 16, 1981, read as follows:

> Section 5. The parties recognize the importance of regular attendance and minimizing absenteeism, tardiness and leaving work early. Therefore, the following absentee control policy is recognized as reasonable and in effect. An employee who is absent shall receive one point on the employee's attendance record. In the case of a prolonged absence, only one point shall be recorded. An employee who is tardy by 6 or more minutes or leaves work early, shall receive one-half point on the employee's attendance record. No points shall be recorded for absences due to vacation, jury duty, funeral leave or leave of absence approved by the Company. Upon the accumulation of 3 points within any 12 week period, the employee shall receive a written warning notice that further unacceptable attendance may lead to discharge. After the receipt of such written warning notice, one point will be subtracted from the employee's attendance record for each 4 week period without the addition of any points or half points. In the event the employee, after receipt of a written warning, and before completely clearing the record of all points accumulated, accumulates 6 points in any 26 week period, the Company shall have the right to discipline such employee by written
>
> (continued)

The judge found under the Respondent's proposal no grievance would ever be winnable because the proposal did not provide for recordkeeping and it permitted the Respondent to exercise untrammeled discretion to impose the ultimate discipline or no discipline on employees who accumulated six points in 26 weeks. He found that the review of discharges for absenteeism by higher management provided by the April 16 modification was meaningless because it would involve choosing between a supervisor's or employee's memory of absences. Although Diederich testified that the Union could win a grievance by showing discrimination,[19] the judge found the wide range of discretion permitted by the program guaranteed the Respondent's right to be arbitrary. The judge, accordingly, found the program to be so "unusually harsh, vindictive, or unreasonable" as to evince bad faith. The Respondent excepts, challenging the judge's conclusions that there would be no recordkeeping and that no grievance would be winnable. We find merit in the Respondent's exceptions.

First, we cannot conclude from the face of the final version of the proposal that there would be no recordkeeping. According to Diederich's unrefuted testimony, the points themselves were a form of recordkeeping. Diederich further testified, without contradiction, that the implementation of the proposal would include recordkeeping of the reasons for the points as well. He

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(fn. continued)
warning, suspension without pay for three days, or to discharge such employee. Any employee to be discharged under this Section 5 may, upon request, have the discharge reviewed for fairness by a committee composed of a Staff Level Manager, Manager of Human Resources and a Department Level Manager of the employee's choice.

19 The Respondent's contract proposals had an antidiscrimination clause.

noted that this was not discussed during negotiations. Nor is there evidence that the Union objected to the proposal on the basis that it failed expressly to provide for recordkeeping. We, therefore, find no basis for adopting the judge's finding that the Respondent was proposing a system in which all grievances would be unwinnable in part because there were no recordkeeping safeguards.

Similarly, we cannot conclude that a review by higher management would be meaningless. Part of the judge's reasoning on this issue was based on his finding that there would be no recordkeeping and, hence, that any review would involve pitting a supervisor's memory against that of an employee. For the reasons stated above, we reject this basis for finding that the proposal evinces bad-faith bargaining. We further reject the judge's conclusion that the proposal, by giving the Respondent discretion regarding the level of discipline to be imposed, guaranteed the right of the Respondent to be completely arbitrary in its treatment of employees who accumulated points under the system. As the Respondent emphasizes, the proposed system contains the right of appeal to higher management for review "for fairness." Any arbitrariness that might occur because of the Respondent's discretion regarding the degree of discipline would be checked by the just-cause clause discipline provision and the no-discrimination provision in the proposed agreement. Thus, the contract provides a ground for an employee to argue that the Respondent's imposition of discipline under the absence control provision was either discriminatory or lacked just cause. In these circumstances, we cannot agree that the structure of the system proposed by the Respondent rendered an employee's right to review by higher management meaningless.

Finally, we find that the evidence establishes that the Union was at least equally responsible for the failure to reach agreement on this topic. Thus, although the Respondent modified its proposal on April 7 and further modified it on April 16 by including the provision for review by higher management, the Union adamantly refused to bargain over any work rules for the first 34 bargaining sessions. As part of this refusal, it never made a full counterproposal with respect to the absence-control program. Its sole proposals concerning this topic were that employees would not get points for going to doctor's appointments or taking their children to such appointments, and that no points would be given for illness. In the face of this conduct by the Union, we do not find that the Respondent's proposals established bad faith.[20] Thus, where both parties have been equally adamant on the same topic and fail to reach agreement, the Board has found a genuine deadlock rather than bad-faith bargaining by one party.[21]

4. Recognition

The judge found further evidence of the Respondent's bad faith in its negotiation over a portion of the recognition clause. That portion, as phrased in the Respondent's last proposal, provided:

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20 In this context, we find it unnecessary to reach the issue of whether the proposal could otherwise be deemed "so predictably unacceptable as to warrant the evidentiary conclusion that [it has] been reoffered in bad faith." *Pease Co. v. NLRB*, 666 F.2d 1044 (6th Cir 1981).

21 See *Bloomsburg Craftsmen*, 276 NLRB 400 (1985); *Unoco Apparel*, 208 NLRB 601, 607--608 (1974), enfd. 508 F.2d 1368 (5th Cir. 1975).

> If the Company decides to create new jobs not presently described in the above-described bargaining unit during the term of the agreement, the Company agrees to notify the Union of its intent and to bargain in good faith with respect to the inclusion or exclusion of such new jobs in the bargaining unit. If no agreement can be reached by the parties, they agree to be bound by a determination of the National Labor Relations Board, or Court of Appeals, as to the inclusion or exclusion of such new jobs.

Assessing the right of review by the court of appeals of unit placement determinations as a nonmandatory subject of bargaining, the judge concluded that the Union was entitled to stand on its objections to the inclusion of a clause containing such a subject and that the Respondent's insistence on the clause constituted a per se violation of Section 8(a)(5). We disagree.

At the outset, we note that the Union did far more than merely object to the inclusion of a clause containing a nonmandatory subject of bargaining. According to the undisputed testimony, the Union was itself insisting on the inclusion of a nonmandatory subject. The Union's January 28, 1981 recognition proposal required that the parties be bound by determinations of the National Labor Relations Board. Thus, the Respondent first offered its court of appeals language to counter the Board language in the Union's proposal. Further, although the Union later agreed to delete the language referring to the Board, it then insisted that unit determinations be finalized by arbitration. In the presence of equally insistent behavior on the same issue, we decline to rule that the Respondent unlawfully insisted on a nonmandatory subject of bargaining.[22] Thus, it is

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22 See *Bloomsburg Craftsmen*, supra; *Unoco Apparel*, supra.

impossible to calculate how flexible the Respondent's position might have been if not met by the equally obdurate position of the Union.[23]

5. Conclusions on overall bargaining

As noted earlier, the judge found that although the Respondent's extensive bargaining on many topics gave no indication of bad faith, he nevertheless found that the Respondent had engaged in overall bad faith bargaining because of its positions on the topics discussed above. Contrary to the judge, however, we have found nothing unlawful in the Respondent's conduct concerning these topics. Accordingly, we conclude that the record does not support a finding that the Respondent engaged in an overall pattern of conduct designed to frustrate the bargaining process. Instead, our examination of the entire course of the Respondent's bargaining reveals that the Respondent was seriously attempting to reach an agreement. It met with the Union on 53 occasions between October 7, 1980, and February 19, 1982. It provided frequent and extensive explanations for its positions and, as the union representative conceded, it intensively examined the Union's initial proposal during the first seven bargaining sessions. Nor was the Respondent merely engaged in the discussion and examination of proposals; it reached full agreement with the Union on at least 23 topics,[24] and made

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23 *Bloomsburg Craftsmen*, supra.

24 Agreement (including partial agreement) was reached on the following issues on the respective dates: safety equipment (November 5, 1980); grievance form (November 6); shift preference (December 2); callback (December 2, 1980, and January 8, 1981); group leaders' pay premium (December 9); military leave (December 10); job bidding and posting (the judge did not specify the date of the agreement, only that it was the "most complex" issue discussed

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numerous significant concessions.[25]

In sum, it appears that the Respondent was not attempting to avoid reaching an agreement but rather to

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(fn. continued)
by the parties; timeclock (December 11); call-in pay, report-in pay, funeral leave, jury leave (all four on January 21, 1981); seniority during medical leave (January 28); new shift staffing and stock purchase and retirement plans (January 28); supervisors working and leaves of absence (February 10); presence of union representatives in plant to discuss grievances; telephone use and discipline concerning such use (February 11); no smoking in cafeteria (February 17); no-discrimination clause (February 18); written notice of new job while on layoff required for loss of seniority (April 1); and temporary upgrades and downgrades (April 2).

[25] The Respondent made concessions on the following topics on the dates specified: seniority list (November 8, 1980): call-in time for absentee employee (January 8, 1981); bulletin boards (January 28); designation of floater holiday and holiday pay for probationary employees (January 29 and March 5); leave of absence to attend union International and district council meetings, and permitting union representative to investigate grievance on companytime (February 10); preamble and productivity clause dropped from management-rights clause (February 11); timing of the grievance steps (February 12); that the Respondent would "acknowledge and agree" to recognize the Union as the agent of the International (February 18); holiday pay and time during which strike permitted after grievance denied (February 25); right to discipline, discharge, and set standards of production removed from management-rights clause (March 6); health insurance (March 6 and April 9, 10, and 13); automatic rather than merit wage increases except for labor grades 27 and 28 (March 12); seniority (April 1, 9, and 16); union steward at grievance meetings (April 1); pay while on sick leave for more that 4 days (April 2); efficiency-quality-productivity clause removed (April 9); lockout limited to period after the Respondent's grievance denied (April 9); discipline and discharge (April 16); absence control (April 16); grievance procedure and no-strike (April 16); management-rights clause (April 16); rules of conduct and disciplinary procedure (April 16); inclusion of senior receiving inspector (May 13); and contract duration (January 21, 1981).

secure an agreement favorable to itself. It is well settled that working toward such an end evinces not surface but hard bargaining.[26] In furtherance of this aim, the Respondent repeated throughout negotiations not only that it was in a position of economic strength but that this position was crucial to maintain in the highly competitive world market. It is not unlawful for an employer to flex its economic muscle in negotiations, just as it is not unlawful for a union to refer to and make use of its power to strike.[27] This is especially the case where, as here, the Respondent has demonstrated flexibility by making concessions, reaching agreements, and providing extensive explanations of its bargaining positions and by not engaging in attempts to frustrate the bargaining process procedurally.

Finally, although the Respondent engaged in some acts of misconduct away from the bargaining table, we conclude that this does not warrant a finding of overall bad-faith bargaining. In this connection, we are reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table. Typically, away from the table misconduct has been considered for what light it sheds on conduct at the bargaining table, but without evidence that the party's conduct at the bargaining table itself indicates an intent to reach agreement it has not been held to provide an independent basis to find bad-faith bargaining.[28] In any event, the Respondent's conduct away from the table here does not indicate an intention to avoid an

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26 *American Rubber & Plastics Corp.*, 200 NLRB 867, 875 (1972).

27 See *Roman Iron Works*, 275 NLRB 449, 452, 454 (1985).

28 See *Baldwin County Electric Membership Corp.*, 145 NLRB 1316, 1317--1318 (1964).

agreement.[29] Thus, although the Respondent violated Section 8(a)(5) and (1) by making unilateral changes in its rule on employee meetings in the cafeteria and on the patio, and its practice of providing an extra half hour for lunch the day before Christmas, there is no evidence that these issues were linked to the ongoing negotiations in such a way as to frustrate the reaching of an agreement.

Further, although we find that the Respondent also violated Section 8(a)(5) and (1) by failing to grant a regularly provided wage increase in February 1981, we cannot conclude that this action prevented the parties from reaching an agreement. The judge found that the Respondent's reason for its failure to provide this increase indicated it was attempting to discount the cost of the Respondent's wage proposal by the usual amounts of the increase. We do not agree with this analysis. The parties' positions on wages throughout negotiations, as discussed below, were too far apart to permit an inference that the small amount involved in the February 1981 increase (from 11 cents to 18 cents per hour, depending on employee classification) was significant with regard to the outcome of the bargaining.[30]

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[29] See *Roman Iron Works*, supra, 275 NLRB at 543; *Wallace Metal Products*, 244 NLRB 41, 50 (1979). Although the Respondent also engaged in various acts of misconduct in violation of Sec. 8(a)(3) and (1), no party contends that there is a connection, and we find no connection, between this conduct and the Respondent's bargaining conduct.

[30] Similarly, we reject the judge's conclusion that the Respondent provided conflicting and incorrect wage information in order to distort the wage picture so as to make the Union's wage proposals appear inflated. As discussed below, we find that the wage information was not incorrect or conflicting; therefore, it did not interfere with bargaining on wages.

Specifically, the Respondent proposed, on March 12, 1981, a wage proposal that would leave wages at their current level until August 1, 1981, at which time, assemblers' wages would increase from $3.75 to $4.04 ($4.16 if in grade for 90 days).[31] On the other hand, the Union consistently proposed throughout the course of negotiations that the wages the Respondent provided for its plants in Minneapolis be provided here. It, therefore, initially requested that all employees be given an immediate increase of 85 cents per hour. This initial increase was to be followed by increases at 3-, 6-, and 9-month intervals to bring the employees up to the Minneapolis level by the end of the proposed contract term, October 1982. At this final level, most classifications would be paid at least $2 per hour more that the rate at the time of the Union's proposal.[32] The Union persisted in its overall wage proposal.[33] In fact, at the last negotiating session on February 19, 1982, it proposed an immediate $1.50-per-hour wage increase. At no point did the Union propose anything lower than an immediate wage increase commencing at 85 cents per hour. With both parties steadfastly asserting wage proposals that were so far apart, we cannot conclude that the Respondent's

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[31] The Respondent does not appear to have altered this proposal until January 21, 1982, when it proposed an increase of 15 cents beginning August 1, 1982.

[32] For instance, assemblers, the most populous classification, who currently received $3.75 per hour, would be paid at a $6-per-hour rate according to the Union's proposal by the end of the contract term.

[33] Its March 10, 1981 proposal sought the following: an immediate 85-cent-per-hour increase with periodic increases bringing the assemblers to $6.59 by May 1, 1982. Its July 21, 1981 proposal reduced the top rate for each classification by 10 cents per hour and called for February 1 and April 1 increases to be made retroactively.

failure to provide the February wage increase evinced an intention to avoid an agreement on wages.

For all these reasons, we conclude that the Respondent's overall course of bargaining did not indicate bad faith or amount to unlawful surface bargaining. We therefore dismiss this allegation of the complaint.

B. Alleged Unilateral Actions[34]

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[34] We adopt the judge's findings that the Respondent made unilateral changes in violation of Sec. 8(a)(5) and (1) by refusing to provide a regularly provided semiannual increase in February 1981 and by announcing new rules about meetings in the cafeteria and on the patio. In adopting these findings, however, we find it unnecessary to rely on the judge's finding that the Respondent could not claim impasse because of its bad-faith bargaining since November 19, 1980. Thus, the judge found that, even if the Respondent had not otherwise bargained in bad faith, the evidence showed that the withholding of the February increase was unlawful. As for the changes in the rules for employee meetings, the judge found that there had been only one discussion between the parties about meetings in the cafeteria (at the January 21 bargaining session) and not about meetings in the patio before implementation of the new rules. Further, we note that at fn. 133 of his decision, the judge erroneously stated that the Respondent has only one other location. According to unrebutted testimony, it has four. This error is nonprejudicial to the judge's finding on the failure to provide the February wage increase.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally discontinuing the extra paid half hour for lunch on the day before the Christmas holiday, we rely solely on the following reasons. The Union learned of the Respondent's intentions indirectly, only 2 days before December 23, 1981, when the holiday lunch was expected to occur. When the Union's representatives voiced a desire that the tradition continue, the Respondent claimed there had been no final decision, but then announced on December 22 that there would be no paid extra half hour for the lunch unless the Union could establish an "economic justification" for the practice. Under all the circumstances, it seems clear that the Union was faced with a fixed decision over which the

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1. Breaks

According to Manager of Manufacturing Operations John McCartin, after he was hired on September 8, 1980, he noticed that the clocks throughout the plants were not synchronized. He further noticed that this situation resulted in employees going and returning from their breaks at different times, which interfered with the coordination of the production lines. Accordingly, a central clock and buzzer system were installed on December 5 and the employees were informed that they were not to begin their traditional two 10-minute paid breaks or 30-minute unpaid lunchbreak until a buzzer went off. Another buzzer would indicate the end of the break.

The complaint alleged and the judge found this change in the break constituted a unilateral change which, because made without bargaining, violated Section 8(a)(5) and (1). The judge based his finding on the fact that some employees had been permitted to

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(fn. continued)
Respondent had no intention of seriously bargaining. Contrary to our dissenting colleague, we regard the practice of providing a paid half hour preholiday lunch as sufficiently longstanding to constitute a condition of employment. In the years 1977, 1978, 1979, and 1980 the Respondent had provided an extra paid half hour for a lunch preceding either the Thanksgiving holiday or the Christmas holiday. In 1981 no such benefit had been provided before Thanksgiving, so the decision not to give it at Christmas represented a change in a 4-year practice.

Member Oviatt would find that the Respondent did not violate Sec. 8(a)(5) and (1) when it decided not to give an extra paid half hour for lunch the day before Christmas. In his view, the Respondent had no consistent practice of granting the employees an extra paid half hour for lunch the day before Christmas. Because there was no past practice, Member Oviatt would find that the Respondent was not obligated to bargain about its decision not to grant one extra half hour for lunch in 1981.

consider only their time in the lunchroom as their breaktime, not including the traveling time involved from various parts of the plant that could be as much as 2-1/2 minutes. He discredited the testimony of supervisors that the Respondent's practice of disciplining employees for late return from breaks did not vary after the buzzer system was installed. The judge therefore reasoned that the newly instituted buzzer system in effect shortened the employees' breaktime and was, accordingly, unlawful.

We disagree. For a unilateral change to be unlawful, it must be "material, substantial, and significant."[35] We do not find the installation of the buzzer system satisfies these criteria.[36]

According to the uncontradicted testimony of employees Carrie Dickens and Sandra Heider, a consequence of the new system was that some employees spent a portion of their break walking to and from the lunchroom or chose to remain at their work station during their break. The official time allotted for the breaks has not changed. That at some location of the plant employees may have enjoyed a grace period of a couple of minutes in transit to and from their breaks before the buzzer system was installed can hardly be viewed as making the buzzer an employment term or condition of much significance.[37] This is especially the case where, as the judge noted, the evidence fails to demonstrate any discernible pattern of those grace periods. Because any change pursuant to the buzzer system did not have a meaningful impact on the

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35 See *Peerless Food Products*, 236 NLRB 161 (1978).

36 See *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976).

37 Ibid.

employees' terms and conditions of employment,[38] we dismiss the allegation.[39]

2. Dental insurance premiums

We do not adopt the judge's finding of a violation in the implementation of an increase in the amount employ-

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[38] Our conclusion is not affected by the judge's discrediting of the three supervisors' testimony that discipline for lateness did not vary after the system was altered. The judge acknowledged that no discipline greater than a verbal warning had occurred after the installation of the buzzer system. Neither can we agree with him that a proposal by the Respondent on "rules of conduct" indicates that the Respondent's disciplinary policy or practice with regard to lateness has changed. The record fails to show such a change.

[39] Chairman Stephens disagrees with his colleagues and agrees with the judge that the Respondent's unilateral change in breaktimes and installation of the buzzer system violated Sec. 8(a)(5) of the Act.

As the majority points out, the Respondent's manager of manufacturing operations, John McCartin, recognized a problem in connection with breaks that he deemed a serious enough impediment to efficiency and productivity that he incurred the expense of a new central clock and buzzer system. As a result, it is undisputed that some employees had their break periods reduced by more than 20 percent. Indeed the testimony by employees Dickens and Heider relied on by the majority, acknowledges that "the effect of this system is that some employees spent a portion of their breaks walking to and from the lunchroom or chose to remain at their work station during their break."

Although the change may not have been "material, substantial, and significant" across the board for all employees, it cannot be gainsaid that it was for those employees whose breaktime was reduced by 20 percent or more. They now have to remain at or near their work station during their break because the change eliminated the previously existing grace period. In sum, although the change may have been an entirely sensible one from the Respondent's viewpoint, it is nonetheless a change about which the Union should have been given notice and an opportunity to bargain.

ees were asked to pay for dental insurance premiums for employee-only coverage (from no payment to $1.61 a month). We have reversed the judge's finding that the Respondent engaged in surface bargaining, so if the parties reached impasse on this issue before the increase was implemented, there is no violation. We find they reached impasse. The Respondent proposed the change on November 19, 1980, explaining to the Union that the insurer would be raising the premium rates in January 1981. The Union counterproposed that the Respondent absorb the increase and continue to pay the entire premium for both employee-only and employee-and-dependent (or "family") coverage. Each party adhered to its position when the issue was raised again, at the December 9 bargaining session. Under all the circumstances, including the limited time frame for resolution of the issue imposed by the action of the third party (the insurer), we conclude that the parties had "exhausted the prospects of concluding an agreement." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).[40]

3. August 3, 1981 changes

On August 3, 1981, the Respondent instituted various changes in the areas of wage rates, night-shift premiums, accident and sickness insurance coverage as pertaining to paid time off, and rates paid for medical insurance coverage. The Respondent contends, and no party disputes, that these changes were consistent with the

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[40] Member Devaney would find that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally implementing an increase in the dental plan premium for employee-only coverage to be paid by unit employees. In his view, the preliminary discussions about this issue that occurred before the Respondent's January 5, 1981 announcement of the increase were not sufficient to permit the conclusion that the parties were at impasse.

Respondent's last proposal on each item. However, the judge found that because the Respondent had engaged in bad-faith bargaining since November 18, 1980, it was precluded from claiming that the negotiations were at a genuine impasse that permitted it lawfully to implement its last offer. The judge therefore concluded that the Respondent violated Section 8(a)(5) and (1) by making these unilateral changes.

We disagree. For the reasons fully explained above, we find that the Respondent did not engage in bad-faith bargaining beginning November 18, 1980. We further find that those incidents where we have found unlawful unilateral changes do not alter this finding.

The Board has long held that the relevant factors to be considered in determining whether a genuine impasse existed are the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or the issues on which disagreement exists, and the contemporaneous understanding of the parties as to the state of negotiations.[41] Our review of the record reveals that all these factors militate in favor of a finding that the parties had reached a genuine impasse.

As for bargaining history, the Respondent had been in operation for less that 4 years when the Union was certified in October 1980 and had no previous bargaining history with this or any other union at this location. However, the Respondent did not deny its obligation to bargain on certification, and negotiations commenced shortly thereafter. At no time has the Respondent denied that it was subject to such an obligation.

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41 *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

As for the good faith of the parties, for reasons fully discussed above we have found that the Respondent's overall course of bargaining was in good faith. Further, although we have found isolated incidents of unlawful conduct, as we have also explained above, these were not responsible for the parties' failing to reach an agreement and do not warrant a finding of surface bargaining. Finally, although the Respondent contends, by way of affirmative defense, that the Union engaged in bad-faith bargaining, no such unfair labor practice charges are before us.[42] We therefore conclude that the prerequisite of good-faith bargaining was sufficiently met to find a genuine impasse.

Further, there appears to be little disagreement that on the date of the alleged impasse, after 47 negotiation sessions, the parties were far away from reaching an agreement on many points, including issues of significance to both parties. Thus, the parties had failed to reach agreement on 50 issues. These included the four issues without which the Union, by its own admission, at the March 12, 1981 session stated it would not sign the contract: layoffs on a strict seniority basis, no loss of seniority if an employee took another full-time job while on layoff, a 10-day period to strike after denial of grievances at the third step, and handling of grievances on working time. The parties had agreed at the first session that there would not be an agreement until the parties agreed on all provisions. It is also noteworthy that the parties were still significantly apart on wages. The Union adamantly insisted on the much higher wages the Respondent provided at its Minnesota plant, and the

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[42] Having dismissed the allegation of surface bargaining against the Respondent without consideration of this defense, it is therefore unnecessary to pass on the judge's findings of bad-faith bargaining by the Union.

Respondent was simply unwilling for economic reasons to provide them.

Finally, we find that the contemporaneous understanding of the parties as to the state of negotiations indicates that the possibility of reaching agreement was virtually nil. Thus, on April, 2, 1981, at bargaining session 33, the Respondent announced that it was preparing its final proposal. On April 9, it presented its final proposal already signed by Personnel Director Kenneth Virag. It did, however, consent to further revisions during session 37 on April 16. After this session the Union made no more concessions. Also, after this session, in at least four out of five of the next sessions, the Respondent repeated that it had spent all the money it was going to spend, that there was no further room for movement, and that the revised April 9 offer was its best offer. The Union responded with accusations of bad-faith bargaining, commencing June 25. At the following meeting on July 22 the Respondent announced it would implement at least the wage proposal of its final offer. The Union responded with more accusations of bad faith at session 47, July 30. This was the last session for Chief Union Negotiator Miller. After this session, he left the negotiations[43] to Kathy Laskowitz and Carol Lambiase. According to Miller, the Union still wanted to try to negotiate the differences and he told Laskowitz to see if there was any room for improvement. As noted above, however, the Union made no further concessions; the Respondent made only a very few. On January 21, 1982, the Respondent proposed a wage increase of 15 cents on August 1, 1982, and the extension of contract termina-

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[43] Miller returned to the final negotiating session (53) on February 19, 1982.

tion to February 6, 1983.[44] Instead, much of the remaining negotiating time was consumed by the Union's accusations of bad-faith bargaining. The negotiations broke off completely February 19, 1982, after session 53. These facts clearly indicate that the parties had been operating for some time under the impression that further bargaining was futile. We find it reasonable to date the parties' perception that negotiations had reached an impasse at July 30, 1981, the date on which the Union's chief negotiator abandoned the negotiations and after which six unproductive, accusatory sessions occurred over the next 7 months during which no agreements were reached and counterproposals were rare.[45]

On the basis of these factors, then, we conclude that the parties had reached impasse by July 30, 1981. In our view, the conduct of the last few bargaining sessions amply illustrates that the bargaining was stalemated on numerous topics. "The Act does not require futile negotiations, and the sessions actually fulfilled gave ample reason to believe that no useful progress could be made toward a total agreement . . . ." *Whittier Area Parents' Assn.*, 296 NLRB No. 102, JD slip op. at 29--30 (Sept. 29, 1989).

We further conclude that the Respondent's violations of Section 8(a)(5) and (1) during the negotiations period, as found above, do not preclude a finding that the parties reached a genuine impasse in negotiations for the following reasons. One, a crucial factor in determining whether a party has forfeited its privilege of announcing

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[44] The Respondent had consistently proposed the contract expire March 30, 1982, over much objection by the Union.

[45] For instance, at the last session on February 19, 1982, the Union proposed an immediate $1.50-per-hour wage increase. This was in response to the Respondent's proposal for a 15-cent-per-hour increase commencing in August 1982.

impasse and lawfully engaging in unilateral action is whether the party had by its own action precluded an agreement being reached.[46] We find that, on a practical level, the Respondent's unlawful conduct away from the bargaining table did not contribute to the deadlock in negotiations so as to prevent a lawful impasse. As we have explained in our discussion of surface bargaining, two of the Respondent's unilateral actions — discontinuing the extra paid half hour for lunch the day before Christmas, and changing the rule about meetings in the cafeteria and on the patio — involved minor topics only and far from crucial to the failure of the ;parties to reach an agreement. Further, as discussed above, the third unilateral change — the Respondent's failure to grant the semiannual February wage increase — did not have a significant impact on whether an agreement was achieved. Thus, as reasons explained above, the parties' differences on wages were so pronounced that the Respondent's failure to provide an increase of approximately 3 percent[47] cannot reasonably be viewed as a significant stumbling block that prevented the parties from reaching agreement on wages, much less on the other approximately 50 issues on which the parties had not agreed.

In these circumstances, we find that the Respondent's conduct, either in the course of negotiations or away from the table, did not preclude the parties from

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46 See, e.g., *J. D. Lunsford Plumbing*, 254 NLRB 1360, 1366 (1981), enfd. mem. sub nom. *Sheet Metal Workers Local 9 v. NLRB*, 684 F.2d 1033 (D.C. Cir. 1982).

47 As noted above, the February increase would have amounted to approximately 11 to 18 cents per hour. Throughout negotiations, the Union consistently requested an immediate (and later retroactive) increase commencing at 85 cents per hour for the lowest paid classification. It at no time reduced this figure to less than 85 cents per hour.

reaching an agreement, and that a valid impasse had been reached.[48] Thus, the Respondent's postimpasse unilateral changes, consistent with its last proposal, were lawful.

C. Alleged Refusal to Provide Information

The complaint alleged and the judge found that the Respondent violated Section 8(a)(5) and (1) by providing the Union with conflicting and inaccurate wage information. We disagree with both findings.

As for the wage information, the evidence is as follows. On September 23, 1980, the Union by letter requested, inter alia, the following information:

> (1) A list of all bargaining unit employees by classification, showing their seniority dates and current rates of pay.
> (2) A list of all jobs in the bargaining unit, the top rate for each job, the progression schedule for reaching the top rate, and job descriptions.

On September 29, 1980, by letter, the Respondent advised that the information requested by item (1) would be sent as soon as possible. With respect to the second requested item, the letter stated:

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[48] See *J. D. Lunsford Plumbing*, supra (valid impasse found where no causal connection between the employer's failure to vacate its prior unilateral changes and the deadlock in negotiations). See also *Allbritton Communications*, 271 NLRB 201, 204-206 (1984), enf'd. 766 F.2d 812 (3d Cir. 1985) (valid impasse found despite presence of earlier violation of Sec. 8(a)(5)). Cf. *Hudson Chemical Co.*, 258 NLRB 152, 157 (1981); *Boulevard Storage & Moving Co.*, 152 NLRB 539, 542 (1965), enf. denied on other grounds sub nom. *United Fire Proof Workhouse Co. v. NLRB*, 356 F.2d 494 (7th Cir. 1960) (employer's surface bargaining and refusal to provide wage information, respectively, resulted in or "contributed significantly to" deadlock and, therefore, no legally cognizable impasse existed).

> Attached is a list of all the jobs in the bargaining unit showing the top rate of pay. We do not have a progression schedule and current job descriptions are not available.

Attached to this letter was a two-column schedule. The first column was headed "UNIT JOB CLASSIFICATION," below which were listed the various classifications; the second column was headed "TOP RATE OF PAY (9--30--80)," below which was listed a single rate for each job classification. For assemblers, who composed more than 90 percent of the unit, the "top rate" was listed as $4.70.

This information was supplemented by the Respondent 4 days later by a letter dated October 4, 1980. It responded to the Union's September 23, 1980 request by providing "a list of all bargaining unit employees by classification, showing seniority dates and current rate of pay." The letter also stated that "[u]nless otherwise indicated, all employees are in the assembler job classification." Attached was a computer printout dated October 1, 1980, and entitled "LIST OF EMPLOYEES." Each employee was listed individually by name, department, employment number, class, rate, and date of hire.[49]

The Respondent's October 21, 1980 letter was followed by a January 15, 1981 letter from the Union, protesting that the computer printout of employees did not list the employees in any discernible order. The Union's letter requested that a current list be provided grouping the employees by job classification, listing the employees within descending order of plantwide seniority within each classification and showing each employee's current rate of pay. It further requested

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[49] On November 15, 1980, the Union received from the Respondent a chart labeling each classification by number.

pertinent information on wage rates, the current "top rate of each job" (as referred to at p. 8 of the employee handbook), and a history of all wage increases for bargaining unit employees made at the plant since its opening.

The Respondent in its January 21, 1981 reply declined to resupply the information it asserted it had already provided the Union, claiming, "you already have what you requested, except you will need to place the names in whatever order you wish." However, it provided current "maximum rates" as requested in a chart specifying the labor grades by number and their accompanying "MAXIMUM/ANNUAL" rate. The maximum annual rate for labor grade 21, that of the assemblers, was listed as $9350.

This information was supplemented February 10, 1981,[50] by a history of wage increases from July 31, 1977, through August 4, 1980, for the classifications of assemblers, custodians, adjusters, and material handlers, and by charts showing the salary ranges for nonexempt levels 1 through 9 and exempt levels 1 through 3, for the following time periods: August 1976 through July 1977, August 1977 through July 1978, August 1978 through July 1979, and August 1979 through July 1980.

The judge based his finding that the Respondent supplied inaccurate wage information on a dialogue that occurred at the seventh bargaining session, held January 21, 1981. Union Negotiator Miller complained that the wage information supplied that date conflicted with wage information provided at the start of negotiations. As as example, he compared the "top rate" of $4.70 for assemblers provided on September 30, 1980, with the

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[50] In the meantime, by a January 24, 1981 letter, the Union had repeated its request, inter alia, for a history of all wage increases.

$4.49[51] "maximum rate" for assemblers provided by the January 21 date. Miller testified that the Respondent's negotiator Diederich explained that there was a difference between the "maximum" of a labor grade and a "top" wage rate for employees in the labor grade and that the Respondent had thought the latter was what the Union wanted in its initial wage information request. The judge credited Diederich that he further explained to Miller that if there was a difference between the two figures with regard to any classification, it was because an employee had been "red circled" in his job. The judge recited the "*Roberts Dictionary of Industrial Relations*" definition of "red circle rate" as a rate higher than that called for by a job evaluation.[52]

The discussion about possible discrepancies in wage information data was repeated at the next bargaining session the following day, with Diederich as well as Virag repeating the Respondent's earlier comments about red circling. At that time, Virag further explained that the current maximums were put in effect in August 1980 as a result of an ongoing study entitled "The Stanton Study." A similar exchange occurred at negotiating session 22 on February 11, 1981, in which further wage information, discussed above, including the history of the wage increase, was discussed. Virag again explained that the information reflected a decrease in maximum wage rates between July and August 1980, which had resulted from the study, and repeated that the red circling was also an effect of this study. Miller testified he had a copy of the study.

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[51] The judge erroneously described this as $4.41 in his summary of the bargaining session.

[52] According to Diederich's uncontradicted testimony, he told the union negotiators that red circles are "when you have a maximum rate and somebody is paid over."

The judge found that the Respondent's "red circling" explanation was an "ad hoc" creation because it was not mentioned in the Respondent's September 29, 1980 response[53] to the Union's request or before bargaining session seven on January 21, 1981; there was no evidence the Respondent had ever told any employee he had been red circled; the Respondent presented no documentation that it had given raises beyond those allowed by its classifications; and it was the Respondent's responsibility to explain the difference between top rates and maximum rates when it provided the Union with the former in its September 29, 1980, reply.[54] He further found that the purpose of this ad hoc creation was to delude the Union by taking the parties' wage demands out of an accurate perspective. Thus, the Union's wage demands would appear proportionately excessive and the Respondent's proportionately more generous in comparison with what he found to be the artificially deflated base of the Respondent's "maximum rates" if the Respondent's red-circling explanation were accepted.

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[53] In his discussion of this issue, the judge mentions only the Respondent's September 29, 1980, and January 21, 1981 responses to wage information requests, not the October 4, 1980, and February 11, 1981 responses described above. Nor does he mention the subsequent negotiating sessions also described above, in which these matters were again discussed.

[54] According to the judge's summation, Diederich explained that the Respondent did not know whether the Union's September 23, 1980 request was for the maximum of each classification or the maximum any employee in that classification was receiving. This is inconsistent with Miller's credited testimony concerning the bargaining session 17 (January 21, 1981). According to that testimony, in the Respondent's September 29, 1980, response, the "top rates" (the most any employee in a classification received) were provided because that is the information the Respondent believed the Union was requesting.

We disagree. First, we disagree with the judge that it was the Respondent's burden to produce specific documentation that it had red circled some employees in the past or to explain in its initial response the difference between the maximum wage for a classification and the top rate an employee in a classification received. An employer's duty when presented with a request for pertinent wage information is to provide that *requested* information. Here, the Union's September 23, 1980 letter requested the Respondent to provide the top rate for each job. In keeping with the Respondent's uncontroverted understanding of "top rate," it supplied this information to the Union on September 29. As for the red circles, the Respondent provided oral explanations of this practice in at least three negotiating sessions. It also provided further wage information as requested when this issue came up in negotiations. At no time did the Union specifically request documentation of the red-circling practice. We accordingly cannot find any fault by the Respondent in not producing this information.

Further, even assuming arguendo that the Respondent was obliged to resolve any apparent conflict in the information it supplied, we find it did so adequately. Thus, not only did it explain to the Union its different interpretations of "top rate" and "maximum rate" and that it had a red-circling practice, but it offered an uncontroverted basis for the lowered maximum rate from July to August 1980, i.e., the Stanton study, which the Union admitted it had in its possession.

In addition, the Respondent supplied supplemental information that the judge does not mention in his discussion of this issue. On October 4, 1980, the Respondent provided the Union with the name, classification, department, seniority date, and wage range of every unit employee. Any confusion about what the Respondent had paid employees in the past could be

resolved by looking at this information in connection with the maximum rates set forth in the Respondent's January 21, 1981 submission, which were explained by the Respondent in bargaining sessions and were supported by the Stanton study.

For these reasons, we find the General Counsel has failed to demonstrate that the maximum wage rates provided by the Respondent were inaccurate or that the Respondent supplied conflicting information. We, accordingly, dismiss this allegation of the complaint.

D. Alleged Refusal to Provide Tour

The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union a timely tour of the plant on its October 7, 1980 request. The Respondent admits it had a duty to provide the union representative a tour of the plant on request but denies that it received such a request until July 10, 1981. We agree.

According to Diederich's notes of the October 7, 1980 negotiating session, after he read the Respondent's proposal on the visitation rights of the union representative, Union Negotiators Miller and Painter stated they wanted to tour the plant sometime when it was convenient for the Respondent. According to Diederich, he interpreted this statement only as as aside, not a request, and he did not respond. The judge found and the Respondent acknowledged that comments of a similar nature were repeated. Thus, on October 15, 1980, in reply to Diederich's inquiry about where a proposed bulletin board would be, Miller answered, "after I have gone through the plant, I will have a better idea about that." On December 11, 1980, Miller stated that "sometime when it was convenient he would like to come in and see the plant in operation and could we

work something out." The judge credited Diederich that he responded this could be arranged although he expressed concern to Miller that any possible disruptions be controlled. At the June 24, 1981 session, Miller said he wanted to see a particular machine in operation, to which Diederich replied, "fine." An argument then followed about whether the Union had made earlier requests for tours that had been refused. Diederich stated the Respondent had no objection and that the Union should make a specific request rather than off-the-cuff remarks. In a July 10, 1981 letter, the Union made what the Respondent concedes was a specific request "that U. E. Field Organizer Kathy Laskowitz, one of the Chief Stewards and (Miller) be allowed to tour the Sioux Falls plant at (the Respondent's) earliest convenience." The Respondent permitted this tour soon afterward.

The judge found no meaningful difference between the written and oral requests. On that basis, he concluded that the Respondent's delay until after the July 10, 1981 request was an unlawful delay in furnishing information in violation of Section 8(a)(5).

We agree with the Respondent that the October 7, 1980 comments and later statements did not amount to explicit requests and that the Respondent's inaction until the written July 10, 1981 request was therefore justified. Thus, on October 7, 1980, immediately after discussion of the visitation provision, the Union representatives stated they wanted to tour the plant "sometime" at the Respondent's convenience. The Union's choice of language indicates that the comment was more in the nature of an aside, and we find that Diederich did not respond unreasonably in so interpreting it. That the union representatives did not pursue the matter when Diederich did not respond further indicates the nonspecific nature of their comments. The October 15 and December 11, 1980 union statements were similarly

nonspecific and the Union did not follow up on them. We do not agree with the judge's implication that it was incumbent on the Respondent to arrange a tour of the plant on what does not reasonably amount to more than an expression of interest. The Respondent by its silence did nothing to foreclose or discourage the Union's option to pursue this interest more actively. This is further evidenced by the Respondent's prompt compliance in July 1981 when presented with a specific request. Accordingly, we find that the Respondent's conduct in this matter was not in violation of Section 8(a)(5) of the Act.

The Remedy

Having found the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent unlawfully withheld the February 1981 increases from the employees, we shall order the Respondent to rescind this unilateral change and pay to all bargaining unit employees the wage increase which would have been payable beginning February 1, 1981, as prescribed in *Ogle Protective Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as computed in accordance with *New Horizons for the Retarded*[55] , and shall maintain the February increases in effect until August 3, 1981, the date on which the Respondent lawfully implemented its final offer on wages. The amount of these increases may be determined at the compliance stage of this proceeding.

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[55] 283 NLRB 1173 (1987).

Having further found that the Respondent unlawfully, in December 1981, unilaterally eliminated the extra paid half hour for lunch on the day before Christmas, we shall order the Respondent to rescind this also, and to make whole any employee who may have suffered losses in wages or benefits as a result of this unilateral change, plus interest as described above.

Further, having found the Respondent also to have violated Section 8(a)(5) and (1) by unilaterally changing its rule about employee meetings in the cafeteria and on the patio, we shall order it also to rescind those changes.

Finally, having found that the Respondent violated Section 8(a)(3) and (1) by issuing warning notices to employees Judy Lawson, Mark Hubert, and John Hassara, and by issuing warning notices to Lawson and Hubert on April 22, 1981, we shall order it to remove from its files any record of the above-described disciplinary action, and to notify these individuals, in writing, that this action has been taken and that evidence of the disciplinary action found unlawful will not be used against them in any way, in accord with *Sterling Sugars*, 261 NLRB 472 (1982).

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2 The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for the purposes of collective bargaining:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Sioux Falls, South Dakota.

facility, including leadpersons, assemblers, adjusters, manufacturing technicians, shipping and receiving clerks, material handlers, schedulers, production control coordinators, dispatchers, cycle counters, locator clerks, inventory coordinators, inventory analysts, inventory clerks, engineering change notice analysts, receiving inspectors, senior receiving inspectors, R. F. meter checkers, quality control technicians, auditors, manufacturing engineering technicians, new models coordinators, mechanics, tool crib clerks, and custodians; excluding office clerical employees, professional employees, and guards and supervisors as defined in the Act.

4. At all times material the Union has been the exclusive collective-bargaining representative of the employees in the unit described in paragraph 3 of this section.

5. The Respondent has violated Section 8(a)(1) of the Act by the following acts and conduct:

(a) Moeller's directive to Hubert to cease talking about the Union on company time, thereby promulgating a discriminatory as well as overly broad no-solicitation rule by that action.

(b) Kozel's interrogation of Dunkelberger.

(c) Klaus' instructing Jungen not to discuss the Union while "on the line" and threatening him with discipline for doing so, while permitting other discussions during working and nonworking time.

(d) Abraham's discriminatorily instructing Dickens not to discuss the Union on the production floor during breaks.

(e) Abraham's discriminatorily instructing Roe not to discuss the Union on the production floor at any time.

6. The Respondent has violated Section 8(a)(3) and (1) of the Act by issuing warning notices on April 21, 1981, to employees Judy Lawson, Mark Hubert, and John Hassara, and by issuing warning notices to Lawson and Hubert on April 22, 1981, including to the extent those latter notices disciplined the employees for disregarding the instructions of the secretary to Director of Operations Michael Dolen to wait before going in to speak to him, and for refusing to change their timecards to reflect the time they spend in discussions with Dolen and Materials Manager Ori, because the employees engaged in union and protected concerted activity.

7. The Respondent has violated Section 8(a)(5) and (1) by unlawfully taking unilateral actions, or actions without notice to and bargaining with the Union on the following topics: a wage increase in February 1981; rules regarding the holding of meetings on nonworking time in nonworking areas; or its provision of an extra paid half hour for lunch on the day before Christmas 1981.

8. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. All other allegations of the complaint are without merit.

ORDER

The Respondent, Litton Microwave Cooking Products, Division of Litton Systems, Inc., Sioux Falls, South Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about United Electrical, Radio and Machine Workers of America (UE) or protected concerted activities.

(b) Instructing employees not to discuss the Union or other protected concerted activity on company time or on the production floor during breaks or at any time and by announcing such a rule while permitting employees to engage in other types of discussions during working and nonworking time.

(c) Instructing employees not to discuss the Union while "on the line" or threatening them with discipline for doing so, while permitting employees to engage in other types of discussions during working and nonworking time.

(d) Issuing warning notices or dispensing any other form of discipline of employees because they have engaged in union or protected concerted activities.

(e) Refusing to bargain collectively with the Union as the exclusive representative of the employees in the unit described above by making unilateral changes in wages, hours, or other terms and conditions of employment.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole all bargaining unit employees employed at the time for its withholding of the February 1981 wage increases, and the recission [*sic*] of the extra paid half hour for lunch the day before Christmas 1981, as provided in the remedy section of this decision, and rescind these unilateral changes as well as those made regarding the rules about employees' meetings in the cafeteria and the patio.

(b) Remove from its files any record of disciplinary action taken against Judy Lawson, John Hassara, and Mark Hubert on April 21, 1981, and against Lawson and Hubert on April 22, 1981, and notify these individuals, in writing, that this action has been taken and that evidence of the action found unlawful will not be used against them in anyway.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at the Respondent's Sioux Falls, South Dakota plant copies of the attached notice marked "Appendix."[56] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[56] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. September 28, 1990

James M. Stephens, Chairman

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD.

APPENDIX C

SELECTED PORTIONS OF DECISION OF ADMINISTRATIVE LAW JUDGE

JD--77--84
Sioux Falls, SD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

LITTON MICROWAVE COOKING
PRODUCTS DIVISION OF
LITTON SYSTEMS, INC.
and
UNITED ELECTRICAL, RADIO AND
MACHINE WORKERS OF AMERICA (UE)

Cases 18--CA--7065
18--CA--7325
18--CA--7402
18--CA--7573

[Names of counsel omitted in printing.]

DECISION

Statement of the Case

DAVID L. EVANS, Administrative Law Judge: This matter was tried before me on 67 different dates between March 9, 1982 and January 26, 1983.* General Counsel issued four complaints (herein collectively called the

* All footnotes eliminated in printing unless otherwise noted.

Complaint) against Litton Microwave Cooking Products Division of Litton Systems, Inc. (herein called Respondent, the Employer or the Company) upon charges filed by United Electrical Radio and Machine Workers of America (herein called the Charging Party or the Union). The Complaints allege several violations by Respondent of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act, herein called the Act. Respondent filed Answers to the Complaints, admitting jurisdiction, status of the labor organization involved, and the status of several supervisors under the Act, but denying the commission of any unfair labor practices within the meaning of the Act.

Upon the record as a whole, including my observations of the witnesses and upon consideration of oral arguments made at the hearing and briefs submitted, I make the following:

Findings of Fact

* * *

[PAGE 56]

Bargaining Session No. 8; November 18, 1980

At this meeting, and the next, Miller was absent on a previously scheduled vacation. Substituting for Miller was Dennis Painter. At this meeting Diederich presented a series of documents entitled "Company Counter Proposals" which, like the union's initial proposal, were statements of general principles, not specific contract language.

The first item of the Respondent's November 18 proposal was:

Company reserves the right to make additional counter proposals. All tentative agreements reached conditioned upon reaching agreement on total package.

Painter stated only the the Union had no objection but would reserve the same right; Diederich agreed that the Union would.

* * *

[PAGES 68-70]

Bargaining Session No. 12; December 9, 1980

* * *

The fourthteenth [sic] item of the Respondent's November 18 proposal was "Wages," which provided:

WAGES

Wage policy is to provide rates competitive with firms in area for comparable work.

Establish a minimum and maximum rate for various labor grades: Job classifications to be slotted into appropriate labor grades.

Employee's rate within rate range to be based on variety of factors, includng [sic] work history, job knowledge, skill, experience, efficiency 90 day review.

Annual increases for all bargaining unit employees, August 1 of each year.

Night shift premium of ___ cents per hour to be negotiated.

For temporary upgrades, get higher rate of pay. For temporary downgrade, get regular rate of pay (unless for convenience of employee).

Group Leader rate . . . 10% over highest-paid

person in group being led (not counting Group Leader's rate.)

Group Leaders to implement orders of supervision, assist supervision, make appropriate recommendations to supervision, and do other assignments as directed by supervision.

If a new job created, or existing job substantially changed, parties will discuss new rate. If no agreement, Company establishes rate which is in effect until end of contract.

Temporary vacancies are those based on reason which is temporary in nature. Company can fill by upgrade or downgrade, and may select employee which results in most efficient operation.

Diederich introduced the Company's wage proposal by stating that it was proposing that minimums and maximums for different jobs be established and that employees would generally be hired at the minimum but there might be situations where more had to be paid to attract a skilled employee. After completing 90 days of probation, employees would received a 12-cent an hour wage increase, then they would get merit increases only except for annual adjustments on August 1 of each year.

As they did repeatedly throughout the negotiations, Miller and Painter asked why Respondent was not proposing to give February 1 increases. Diederich responded:

> When this plant started out, they had a policy employees would receive increases on August 1. The plant manager, Mr. Rainey, went to Minneapolis . . . in February — I think, 1977, 1978 and 1979. In each of those years, he went to Minneapolis and got permission to give some of those people part of their August increase in February. . . . It was on an [exceptional] basis that required asking

> permission and getting approval. It was inconsistent not only with what the policy here was, but with the entire division policy of an annual increase in August, and that the policy was never to give February increases.

Diederich continued that the real policy was only to give August 1 increases and giving February increases to some employees caused problems because some employees got 3 percent in February and others got none; then when August came, the employees who gotten increases in February would get smaller increases than those who had gotten none. Therefore, Respondent received both February and August employee complaints because of what Rainey had done.

Miller told Diederich that Respondent had given wages increases to the unit employees in both February and August for over 3 years and it should continue that practice; that employees always get wage inceases [sic] when contracts are signed, and, when this one was ultimately reached, all wage increases should be retroactive to October 31, 1980.

* * *

[PAGES 88-89]

Bargaining Session No. 18; January 22, 1981

* * *

Miller and Poletta again questioned Diederich about why February increases had not been given; Diederich repeated that:

> Mr. Rainey had gone over and gotten permission for some of the people to get those increases, part of those increases early. That it was an exception, and that Mr. Dolen was not proposing to do that. That the August 1 increase was consistent throughout the

> entire corporation, and this group of people over here who got February [increases] were the only ones in the corporation that got [them] and Mr. Dolen wanted to eliminate it. And were proposing that there wouldn't be a February increase. We were proposing that increases be in August.

* * *

[PAGE 100]

Bargaining Session No. 23, February 12, 1981

At the beginning of the meeting Diederich pressed Miller for his answer to the proposition that the Company would drop the Productivity and Preamble proposals if the Union would accept Respondent's management rights clause. Miller refused to give an answer at that point. Miller stated that he wish to talk about the Company's "takeaway's." Diederich asked Miller what he was talking about and Miller recited a listing:

(1) No February wage increase. Diederich said Respondent was not going to give wage increases in February as well as August and he repeated the reasons given previously. Diederich added that Miller knew the Respondent was not going to propose the February increase as early as the Respondent's written proposal of November 18.

* * *

[PAGE 150]

(s) Overall bad faith

I have found the Respondent has refused to bargain with the Union by insisting on a "zipper" clause which required the Union to waive all rights under all statutes which may exist for the benefit of the employees or

itself, by refusing to consider the Union's demand for checkoff, by insisting upon the nonmandatory subject of bargaining that any contract express its right of review of Board unit placement decisions, and by insisting upon the unusually harsh provisions contained in its "no fault" absence control policy.

As discussed above, the only reasons given the Union for Respondent's refusal to agree to the Union's check-off proposal collectively constituted a sham. Respondent gave no reason for its insistence on a zipper clause which would require the waiver of all rights under all statutes, or for its insistence on a contractual expression of its right of review of Board unit placement determinations. While it gave reasons for some absence control program, it insisted upon its unusually harsh "no fault" program with the supreme confidence that the proposal could not be accepted by this Union or any other union which purports to represent employees to their benefits rather than their detriment.

Respondent's reliance on sham or nonexistence "reasons" for its positions and its insistence upon a term of the contract which was as harsh as its absence control program demonstrate that Respondent was seeking to frustrate agreement rather than reach one. This is true, even though I have found no palpable evidence of bad faith in Respondent's bargaining on most issues in dispute between the parties. The number of issues upon which Respondent bargained in bad faith is not the question; a bad faith position on one issue can frustrate bargaining on all other terms in the host of items which may be covered by a comprehensive collective-bargaining agreement.

Therefore, I am in agreement with General Counsel and Charging Party that, despite its extensive bargaining on many topics which bears no independent reflection of bad faith, Respondent has engaged in an overall pattern

of conduct designed to frustrate the bargaining process. While it is impossible to determine with certainty just when Respondent adopted this pattern of conduct, it was at least by November 18, 1980, when it not only rejected the Union's proposal for checkoff, it did so with a closed-minded hostility revealed by the counterproposed punishment of any employee who attempted to collect dues in other ways.

Accordingly, I find and conclude that at all times since November 18, 1981, Respondent has failed and refused to bargain in good faith with the Union on the topics of checkoff, zipper clause, and absence control program, and has insisted on a non-mandatory subject of bargaining, and has further engaged in an overall pattern of bad faith bargaining all in violation of Section 8(a)(5) and (1) of the Act.

* * *

[PAGES 164-168]

i. February 1981 wage increase

The complaint alleges:

> On a date not known to [General Counsel], Respondent discontinued its policy of wage increases, which increases were customarily given during the month of February of each year, and which should have been, but were not, given during February 1981.

Respondent admits that it did not give any unit employees wage increases in February, 1981. It denies, however, that it had a policy of February wage increases; it contends that its policy was to give wage increases only in August, and, therefore, it had no duty to bargain with the Union before denying February 1981 wage increases to employees. Alternatively, Respondent

argues that it bargained to impasse over its proposal not to grant any wage increases that month.

The plant opened in April of 1977. According to information Virage submitted by memorandum to the Union on February 10, 1981, Respondent granted wage increases to the employees in four classifications (assemblers, custodians, adjusters and material handlers) on the following dates: July 31, 1977; January 30, 1978; July 31, 1978; January 29, 1979; July 31, 1979; February 4, 1980; August 4, 1980. According to other information submitted to the Union, on April 28, 1981, Respondent employed 513 employees; 477 of these, or 93 percent, were then in the four classifications affected by the seven wage increases. Maintenance mechanics (in which classification there were five employees on April 28, 1981) were reviewed on a merit basis at times not specified by Virag's February 10 memorandum; in addition, they received up to 25 cents on a merit basis and 50 cents on a non-merit basis when production employees received increases on February 4, 1980, and they received 40 cents when production employees got 25 cents, non-merit, on August 4, 1980. According to that memorandum, the remainder of the employees were reviewed according to a schedule for technical and office employees. Just what review increases these other employees received was not shown at the hearing.

Respondent argues that wage increases were not given to all unit employees in each of the three February's before 1981; not all classifications were included in the increases; and for each classification Respondent was permitted a degree of discretion.

While Respondent denies that all unit employees received all February raises, it never specifies which employees did not receive them, other than to say that employees who were probationary and who were not in the classifications of material handlers, assemblers,

custodians and adjusters did not receive the increases. Since, according to General Counsel's Exhibit No. 104 and Virag's testimony, there was a layoff of 128 probationary employees on December 23, 1980, it is unlikely that there were any probationary employees left on February 1, 1981. Also, as observed above, 93 percent of the unit employees fall into the four classifications, and the maintenance mechanics did receive a non-merit increase in February, 1980. Moreover, on or shortly after October 24, 1979, the following memorandum was posted at the Sioux Falls plant:

> TO: SIOUX FALLS EMPLOYEES
>
> The company is pleased to announce that the six-month performance review program will be continued through calendar year 1980. As in the past all Sioux Falls employees will have two performance reviews: the first will be in February, 1980 and the second in August, 1980.
>
> The company, within the limitations of the government guidelines, plans to provide salary adjustments that are fair and equitable for our employees. As in previous reviews, your performance will dictate your individual adjustment.
>
> This is part of our continuing commitment to our employees to remain competitive with the Sioux Falls community.
>
> (signed) J.H. Conley

Conley is Respondent's Divisional Vice-President of Consumer Operations. The lack of qualification in Conley's memorandum to all "Sioux Falls Employees" belies any contention that less than all employees were

going to be reviewed, or that less than all employees were to receive increases in February, 1980.

However, if any employees were to be denied that raise, or any other of the previous February increases, Respondent assuredly had the records to prove it. I draw an adverse inference from Respondent's failure to produce such records, and reject its contention that some unit employees did not get the prior February wage increases.

Respondent contends that despite the fact that February increases were, in fact, given to the employees in the four classifications which comprised over 90 percent of the unit, and despite the fact that employees were never told that Respondent had a policy of granting only August wage increases, Respondent had such a policy. In support of this argument, Respondent relies on testimony of Division President, Wayne Bledsoe. Bledsoe testified that before the February 1979 and 1980 wage increases were given he was prevailed upon by subordinates to grant exceptions to Respondent's policy of granting only August wage increases. According to Bledsoe he reluctantly agreed to the February increases but, both times, told the subordinates that he would not agree to February increases again.

Aside from the fact that Bledsoe's testimony does nothing to explain why the employees were granted a wage increase in February, 1978 if "Division policy" was otherwise, Bledsoe paints the absolutely incredible picture of the tail wagging the dog. Bledsoe is chief executive of the Microwave Cooking Products Division of Litton Industries which is comprised of the Minneapolis and Sioux Falls plants. Individuals do not attain and retain such positions of responsibility being led around by subordinates on such vital issues as wages. In summary, Bledsoe was absolutely incredible, and I firmly believe, and find, that the "August only"

policy simply did not exist before bargaining sessions began.

However, assuming that Bledsoe's testimony was not false and that the "August only" policy existed before bargaining began, Respondent's board room deliberations do not determine the issue. What the employees have known and what they reasonably have come to expect determines whether an issue requires bargaining. As stated by the Board in *Liberty Telephone & Communications, Inc.*, 204 NLRB 317, 318 (1973), terms and conditions of employment over which bargaining is required include:

> . . . the normal foreseeable expectations arising out of the relationship including the *expected weekly wage*, the usual promotion policy, anticipated wage increases, customary bonuses and vacation, and other announced or *expected benefits* which constitute the terms and conditions of employment. (Emphasis supplied.)

Therefore, although a February wage increase, or review, had not expressly been announced for 1981, it assuredly had been reasonably anticipated by the employees from Respondent's prior grants of February wage increases in all prior years that the plant had been opened. This expectation which Respondent fostered by its own conduct gave rise to an obligation on the part of Respondent to bargain in good faith before making changes in this term and condition of employment. Therefore, it must be concluded that Respondent had an established policy of wage reviews and raises in February of each year, and it was obligated to bargain in good faith to impasse with the Union before making any change in that policy.

My previously-expressed conclusion that at all times after November 18, 1980 Respondent failed and refused to bargain in good faith precludes a holding that Respondent bargained to impasse before it refused to pay the February, 1981 wage increase, and a holding that Respondent violated Section 8(a)(5) and (1) by withholding those wage increases is compelled. However, even assuming that Respondent bargained in bad faith on no other issue, I would find that Respondent refused to bargain in good faith on this issue and that its conduct affected all bargaining on wages.

I believe, and find, that the "August only" wage increase policy was created *ad hoc* for the purpose of deluding the Union at the bargaining table. The increase was not given because Respondent was withholding the expected wage increase as bargaining leverage, not because of any "Division policy" (as Bledsoe claimed), or "corporation policy" (as Diederich claimed), and the Union knew it. Therefore, the Union was placed in the position of fatuously accepting Diederich's false representations of an "August only" wage review policy or continuing in demands which Respondent could, as it did, characterize as ridiculous. While the Union demands were high, they were not as high as Respondent made them out ot be, given the fact that they incorporated the wage increase the Respondent was unlawfully withholding. This tactic took the Union's demand out of perspective and necessarily impeded the progress of wage negotiations. However, since the issue of wages is at the epicenter of the employment relationship, Respondent's "August only" artifice necessarily permeated all aspects of the bargaining.

Therefore, I conclude that Respondent's withholding of the reasonably anticipated February 1981 wage increase was a unilateral action in violation of Section 8(a)(5) and (1); and I further conclude that Respondent's

employment of the "August only" bargaining tactic is further evidence that it bargained without intent to reach any agreement with the Union.

* * *

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2813

Litton Microwave Cooking Products,
Division of Litton Systems Inc.
(predecessor to Microwave Products
of America, Inc.),
Petitioner,
vs.
National Labor Relations Board,
Respondent.
United Electrical Radio and
Machine Workers of America,
Intervenors.

Petitioner [*sic*] for Review of Order of the
National Labor Relations Board

JUDGMENT

This cause was submitted on the petition for review of an order of the National Labor Relations Board, administrative record, appendix, briefs of the parties and was argued by counsel.

After consideration, it is hereby adjudged and decreed that the order of the National Labor Relations Board is affirmed in accordance with the opinion of this Court.

November 12, 1991

A true copy.
ATTEST: /s/ MICHAEL E. GENS
CLERK, U.S. COURT OF APPEALS
EIGHTH CIRCUIT

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2813

Litton Microwave Cooking Products,
Division of Litton Systems Inc.
(predecessor to Microwave Products
of America, Inc.),
Petitioner,
vs.
National Labor Relations Board,
Respondent.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is also denied.

December 23, 1991

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GENS
CLERK, U.S. COURT OF APPEALS
EIGHTH CIRCUIT

(2)

No. 91-1259

Supreme Court, U.S.
FILED
APR 1 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

LITTON MICROWAVE COOKING PRODUCTS, DIVISION OF LITTON SYSTEMS, INC., ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's determination that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by departing from its past practice of granting a merit wage increase to employees without bargaining with the union.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Alsey Refractories Co., 215 N.L.R.B. 785 (1974)	5
American Telecommunications Corp., 249 N.L.R.B. 1135 (1980)	9
B.F. Goodrich Co., 195 N.L.R.B. 914 (1972)	9
Bi-Rite Foods, Inc., 147 N.L.R.B. 59 (1964)	5
Carpenter Sprinkler Corp. v. *NLRB*, 605 F.2d 60 (2d Cir. 1979)	6
Guy Gannett Publishing Co. d/b/a Central Maine Morning Sentinel, 295 N.L.R.B. No. 42 (June 15, 1989)	10
Litton Financial Printing Div. v. *NLRB*, 111 S. Ct. 2215 (1990)	6
NLRB v. *Katz*, 369 U.S. 736 (1962)	4, 5, 8-9
NLRB v. *Nabors Trailers, Inc. (n/k/a Steego Transportation Equipment Centers, Inc.)*, 910 F.2d 268 (5th Cir. 1990), cert. granted, 111 S. Ct. 1680, cert. dismissed, 112 S. Ct. 8 (1991)	5
NLRB v. *Pinkston-Hollar Construction Services, Inc.*, No. 90-4483 (5th Cir. Feb. 27, 1992)	6
NLRB v. *U.S. Sonics Corp.*, 312 F.2d 610 (1st Cir. 1963)	6
Richmond Recording Corp. v. *NLRB*, 836 F.2d 289 (7th Cir. 1987)	6
Shell Oil Co., 77 N.L.R.B. 1306 (1948)	9
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951)	8
Winn-Dixie Raleigh, Inc., 267 N.L.R.B. 231 (1983)	9, 10

Statute: Page

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 3, 9
§ 8(a)(5), 29 U.S.C. 158(a)(5) 3, 5
§ 8(d), 29 U.S.C. 158(d) 5

In the Supreme Court of the United States

OCTOBER TERM, 1991

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 949 F.2d 249. The decision and order of the National Labor Relations Board (Board) (Pet. App. B1-B50) are reported at 300 N.L.R.B. No. 37.

JURISDICTION

The judgment of the court of appeals (Pet. App. D1) was entered on November 12, 1991. The petition for rehearing was denied on December 23, 1991. Pet. App. E1. The petition for a writ of certiorari was filed on January 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a plant for the manufacture of microwave cooking products in Sioux Falls, North Dakota. Pet. App. B2. In September 1980, the United Electrical, Radio and Machine Workers of America (the Union) was certified as the bargaining representative of petitioner's Sioux Falls production and maintenance employees. From the opening of the Sioux Falls plant in 1977 until 1980, petitioner granted merit wage increases to most of its production and maintenance employees in both August and February of each year. *Id.* at C9. Under the formula used by petitioner to grant merit increases, the employees were due to receive a wage increase in February 1981. *Id. at* B24, B35 n.47.

Negotiations between the Union and petitioner for a collective bargaining agreement began on October 7, 1980, and concluded on February 19, 1982, after the parties failed to reach agreement. Pet. App. B21. At a bargaining session on December 9, 1980, the parties first discussed petitioner's wage proposal, which included an annual August increase in wages. At that meeting, the Union stated that petitioner should continue its past practice of giving a February wage increase until agreement was reached on a new contract. *Id.* at C3-C5. Petitioner responded that the prior February increases did not reflect its settled policy, but, rather, were exceptions to its practice of granting increases only in August. *Ibid.* Petitioner's wage policy was again discussed at the January 22, 1981, bargaining session when the Union complained about petitioner's refusal to grant the February increase. Petitioner again responded that previous February increases were an exception to its general policy. *Ibid.*

No wage increase was given in February 1981. Pet. App. C8. On August 3, 1981, petitioner implemented changes in wage rates and certain other terms of employment, consistent with its last proposal to the Union as of that date. The proposal did not include a regular February wage increase. *Id.* at B30-B31.

2. a. The ALJ found that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), in 1981, by unilaterally departing from its past practice of granting semi-annual merit wage increases. Pet. App. B24, B26 n.34, C13-C14. The ALJ rejected petitioner's assertion that it had no past practice of wage reviews and raises in February of each year. The ALJ relied on a company memorandum to all the Sioux Falls employees setting out the twice-yearly review policy, *id.* at C9-C10, and noted that virtually all full-time employees had regularly received semi-annual raises since the opening of the plant. *Id.* at C8-C13.

The ALJ also rejected petitioner's contention that it had bargained with the Union about discontinuing the February 1981 increase. The ALJ concluded that, rather than bargain about discontinuing its policy, petitioner steadfastly maintained that it was not required to do so because it had "an 'August only' wage review[.]" Pet. App. C13.

b. The Board affirmed the ALJ's finding that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by departing in 1981 from its past practice of granting a February wage increase. Pet. App. B24, B26 n.34, C13-C14.[1] The

[1] While the Board agreed with the ALJ that petitioner violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing its policy of regularly giving a wage increase in

Board ordered petitioner, *inter alia*, to make whole the bargaining unit employees for withholding the February increase by paying them the wage increases to which they would have been entitled beginning February 1, 1981, and maintaining that increase until August 3, 1981, the date on which petitioner lawfully implemented its final offer on wages. Pet. App. B44.

3. The court of appeals affirmed the Board's decision and enforced its order. Pet. App. A8. The court found substantial evidence in the record to support the Board's position that it was petitioner's practice to grant a February wage increase and that petitioner never bargained about the February 1981 merit increase. *Id.* at A6. The court observed (*ibid.*):

> Litton had given merit increases in January or February of each year since the plant was opened. It notified employees about the program of increases via the employee handbook and notices posted in the plant. In 1981 it simply discontinued the February increases, maintaining that it had never established a practice of giving the increases.

The court rejected petitioner's contention that "it could not have granted a February merit increase because doing so would have been a unilateral change in wages imposed before reaching impasse." Pet. App. A6. Citing *NLRB* v. *Katz*, 369 U.S. 736 (1962), the court explained that, where an employer has a practice of granting merit increases, it may not dis-

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February, it disagreed with the ALJ that this conduct was "linked to the ongoing negotiations in such a way as to frustrate the reaching of an agreement." Pet. App. B24. Accordingly, the Board rejected reliance on the unilateral action to establish that petitioner's overall course of bargaining was in bad faith. *Id.* at B26.

continue that practice unilaterally, but "must maintain the general outline of the program and consult the bargaining agent about implementation of the program." Pet. App. A6.

ARGUMENT

1. Under Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(d) of the Act, 29 U.S.C. 158(d), defines the duty to bargain as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." In *NLRB* v. *Katz*, 369 U.S. at 737, the Court held that an employer may not make a change in existing terms of employment "without first consulting a union with which it is carrying on bona fide contract negotiations." The Board has interpreted *Katz* to mean that an employer must bargain to impasse before making changes in existing employment conditions. See *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59, 64-65 (1964); *Alsey Refractories Co.*, 215 N.L.R.B. 785, 786 & n.6 (1974).

Petitioner contends (Pet. 8-10) that the decision of the court below conflicts with *NLRB* v. *Nabors Trailers, Inc. (n/k/a Steego Transportation Equipment Centers, Inc.)*, 910 F.2d 268 (5th Cir. 1990), cert. granted, 111 S. Ct. 1680, cert. dismissed, 112 S. Ct. 8 (1991). In *Nabors*, 910 F.2d at 273, the Fifth Circuit rejected the Board's longstanding position by holding that "there is no violation of [Section 8(a)(5)], even in the absence of an impasse,

if the employer notifies the union that it intends to institute the change and gives the union the opportunity to respond to that notice." [2] Because the Fifth Circuit's position was contrary to that of other courts of appeals that had addressed the issue,[3] the Board filed a petition for certiorari in *Nabors* to consider whether an employer must ordinarily bargain to impasse before implementing unilateral changes in working conditions that are mandatory subjects of bargaining. This Court granted the petition, 111 S. Ct. 1680 (1991), but subsequently dismissed it at the request of the parties after they reached a settlement.

This case does not present an opportunity to resolve the issue presented in *Nabors*. The court of appeals did not find that petitioner unilaterally changed its practice of granting a February wage

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[2] See also *NLRB* v. *Pinkston-Hollar Construction Services, Inc.*, No. 90-4483 (5th Cir. Feb. 27, 1992), slip op. 2837 (relying on *Nabors* to reiterate the Fifth Circuit's position that it "is not a violation of the duty to bargain collectively, even in the absence of an impasse, if the employer notifies the union that it intends to institute [a] change and gives the union the opportunity to respond to that notice.").

[3] See *Carpenter Sprinkler Corp.* v. *NLRB*, 605 F.2d 60, 64-65 (2d Cir. 1979); *Richmond Recording Corp.* v. *NLRB*, 836 F.2d 289, 292-293 (7th Cir. 1987); *NLRB* v. *U.S. Sonics Corp.*, 312 F.2d 610, 615 (1st Cir. 1963), and other cases cited in the petition for a writ of certiorari, at 14, in *Nabors*, No. 90-1165. After the petition in *Nabors* was filed, but before it was dismissed, this Court relied on its decision in *Katz* to observe in dictum that "[t]he Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Financial Printing Div.* v. *NLRB*, 111 S. Ct. 2215, 2221 (1990).

increase without bargaining to impasse; rather it affirmed the Board's determination that petitioner discontinued its past practice without bargaining *at all*. The Board found that the February wage increase was an established part of petitioner's wage structure, and was therefore a mandatory subject of bargaining. The Board further found that, when the Union sought to bargain about the wage increase that was due in February 1981, petitioner contended that it did not have a policy of giving such an increase. Petitioner subsequently failed to increase wages in February of 1981. The Board concluded that petitioner had unilaterally abolished the February wage increase without bargaining with the Union over the proposed change. On the facts as found by the Board, petitioner's conduct is a straightforward violation of the rule in *Katz* that an employer cannot make a unilateral change in working conditions without negotiating with the employees' representative over that change.[4]

In short, this case does not present the choice between the Board's bargain-to-impasse rule, which has been adopted by other Circuits, and the Fifth Circuit's view that providing the union notice and an opportunity to respond licenses the employer's unilateral change in working conditions. Petitioner's challenge to the decision of the court below raises,

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[4] Petitioner cited the Fifth Circuit's decision in *Nabors* for the first time in its petition for rehearing in the court of appeals. Prior to that time, petitioner had argued that, since the February increases were based on merit and thus involved the exercise of discretion, petitioner was precluded under *Katz* from granting the increases "absent the agreement of the union or the parties bargaining to impasse on such increases." Pet. C.A. Br. 27. The court of appeals properly rejected that argument. Pet. App. A6.

at most, an evidentiary issue as to whether the February increase was an established employment practice and whether petitioner changed that practice without bargaining about the change with the Union. The court of appeals determined that there was substantial evidence in the record to support the Board's position that "the February increase was [petitioner's] practice and that [petitioner] *never bargained* about the 1981 merit increase." Pet. App. A6 (emphasis added). Further review of these findings is not warranted. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

2. Petitioner is on no firmer ground in contending (Pet. 11-13) that, since the February increases were based on merit and thus involved the exercise of discretion, *Katz* precluded granting the increases while petitioner was bargaining with the Union. The Court in *Katz* held that, where merit wage increases are largely discretionary, they cannot be implemented until the employer has bargained with the union over implementation of the increases. However, nothing in that decision suggests that, where, as here, the employer has a regular policy of granting merit increases at a particular time, it can abandon that policy unilaterally.[5] On the contrary, *Katz* holds that

[5] Petitioner appears to argue (Pet. 11) that it bargained over the February wage increase because it notified the Union in November 1980 of its wage proposal, which included a once-yearly increase in August, and negotiated with the Union over that proposal on three occasions before the end of February 1981. In presenting its proposal for an "August only" merit increase, however, petitioner adhered to the position that its proposal for a once-yearly increase represented settled company policy, and thus refused to engage in direct bargaining with the Union concerning the customary February merit increases. See Pet. App. C13-C14.

"an employer's unilateral change in conditions of employment under negotiation is * * * a violation of [Section] 8(a)(5)." 369 U.S. at 743.

3. Petitioner contends (Pet. 10) that Board cases establish that "in the context of good-faith bargaining, an employer may withhold a wage increase during negotiations and condition the granting of wage increases on reaching a final contract settlement." The decisions on which petitioner relies do not apply to this case. In *Shell Oil Co.*, 77 N.L.R.B. 1306, 1309-1310 (1948), the Board held that the employer did not engage in unlawful discrimination in refusing, during bargaining negotiations for represented employees, to give those employees wage and hour improvements recently granted to unrepresented employees. In contrast with this case, the unionized workers in *Shell Oil* were not seeking to preserve the status quo; the concessions they sought represented a *change* from pre-existing wage policy. In *B.F. Goodrich Co.*, 195 N.L.R.B. 914, 915 (1972), the Board applied the principle articulated in *Shell Oil* to benefits other than wages, holding that the employer was not required to grant to organized employees new profit-sharing benefits that had previously been granted to unorganized employees.

In *American Telecommunications Corp.*, 249 N.L.R.B. 1135, 1137 (1980), the Board determined that the employer violated Section 8(a)(1) by denying benefits to recently organized employees that it had granted to unorganized employees because the disparate treatment was due to anti-union animus. There is no finding of anti-union animus in this case. Finally, in *Winn-Dixie Raleigh, Inc.*, 267 N.L.R.B. 231, 235-236 (1983), the Board ruled that the employer did not violate the Act by temporarily

withholding a regular annual wage increase from represented employees but not from unrepresented employees. Although acknowledging that the employer was obliged to "maint[ain] * * * preexisting practices," *id.* at 235, the Board noted that the issue of the annual increase and its magnitude was under active negotiation during the period in question, and that the employer implemented the increase as soon as the differences over the amount were resolved. Here in contrast, there was no bargaining over the February semi-annual increase at the time the increase was withheld; indeed, petitioners maintained that there was nothing to bargain about. See *Guy Gannett Publishing Co. d/b/a Central Maine Morning Sentinel*, 295 N.L.R.B. No. 42 (June 15, 1989), slip op. 8 (distinguishing *Winn-Dixie Raleigh* from the situation in which, as here, the amount of the benefit was not under discussion at the time it was withheld).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-1259

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Petitioner,
vs.
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Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. ii

STATEMENT OF THE CASE 1

ARGUMENT 2

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Cases

H. K. Porter Company, Inc., Etc. v. National Labor Relations Board 397 U.S. 99 (1970). 6

National Labor Relations Board v. Katz 369 U.S. 736 (1962) 1, 3, 6, 7

National Labor Relations Board v. Nabor Trailers, Inc. (NKA Steego Transportation Equipment Centers, Inc.) Docket No. 90-1165 8

Statutes

29 U.S.C. §158(a) and (d) 6

No. 91-1259

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Respondent.

PETITIONER'S REPLY BRIEF

STATEMENT OF THE CASE

The petition filed by Litton in this case presents two questions. First, whether the pertinent statutory sections require an impasse in bargaining before an employer may make a unilateral change in a mandatory subject of bargaining, wages in this case? The second question presented is more specific: Do those statutory sections, as interpreted in *Katz*, require an employer bargaining in good faith with a union over an initial contract to grant merit increases to all represented employees because it has granted such increases to some employees in prior years, when the employer has provided the union with ample notice of its proposal not to pay such increases

and the union has been afforded ample opportunity to bargain over the proposal?

The Board opposes granting the petition claiming this is not an impasse case, conceding there is a conflict among various circuits over the impasse requirement.

This brief replies to the Board's brief in opposition.

ARGUMENT

1. First, there is a serious conflict between several circuits on the impasse issue. The Courts of Appeals for the Fifth and (presumably) Eleventh Circuits hold there is no impasse requirement, while the Courts of Appeals for the Second, Seventh, D.C. and Eighth Circuits hold an impasse is required. See petition (pp. 14-15) and reply brief (pp. 2-5) in Docket No. 90-1165.

2. The impasse issue is a significant one, affecting virtually every collective bargaining negotiation. It is a recurring problem, as can be seen by the number of circuit courts which have decided impasse cases. The impasse issue ought to be resolved.

3. The Board argues this case is not an impasse case. The Board is wrong. The impasse issue is directly raised in the decision of the Court below, which is the decision which petitioner is asking this court to review. The Court below flat out held that "until parties reach impasse in negotiations over labor matters, an employer must 'maintain the status quo as to wages and working conditions.' " Pet. App. A 3. That was the *only* rationale offered by the Court below in support of its decision to enforce the Board's order. The decision of the Court below directly raises an issue which is important to labor and management and which is presently in a state of

confusion because of a conflict between at least six Courts of Appeals.

The Board argues that its decision does not raise the impasse issue because the Board found Litton did not bargain "at all" over the payment or nonpayment of merit increases. Brief in Opp. p. 2. As will be noted shortly, this is wrong. According to the Board, this is a *Katz* case, *i.e.*, one where the employer unilaterally changes a mandatory condition of employment without notice to the union. While difficult to believe, Board Counsel apparently does not understand the decision. A review of the undisputed facts demonstrates this misunderstanding.

The Board's Administrative Law Judge (ALJ) found Litton had violated the Act by not paying February, 1981 merit increases. He pointed out that Litton had raised two defenses to the charge against it: (1) Litton denied "that it had a policy of February wage increases," and (2) that "it bargained to impasse over its proposal not to grant any wage increases" in February, 1981. Pet. App. C 8-9. In response to those defenses, the ALJ found Litton "had an established policy of wage reviews and raises in February of each year, and it was obligated to *bargain in good faith to impasse* with the Union before making any change in that policy." Pet. App. C 12. But, said the ALJ, Litton could not have "bargained to impasse before it refused to pay the February, 1981 wage increase" because he found Litton had bargained in bad faith on four other topics. Pet. App. C 13. Further, said the ALJ, even if Litton had not bargained in bad faith on the four other topics, he would still find Litton had bargained in bad faith on the February merit increase issue because he believed Litton's argument at the bargaining table that it had no policy of February wage increases "was created *ad hoc* for the purpose of deluding the

Union at the bargaining table." Pet. App. C 13. There are two things inherent in this finding: (1) Litton told the Union it proposed no February increases and (2) the parties discussed the proposal.

The Board adopted "the judge's findings that (Litton) made unilateral changes in violation of (the Act) by refusing to provide a regularly provided semiannual increase in February 1981." But, said the Board, it was not relying "on the judge's finding that (Litton) could not claim impasse because of its bad-faith bargaining since November 18, 1980." Pet. App. B 26, fn. 34. Indeed, it could not rely on that finding because it expressly rejected it. Pet. App. B 21. Further, the Board clearly appeared to have rejected the ALJ's alternative basis for finding a violation, *i.e.*, that Litton had created a false reason for not paying a February increase in order to delude the Union. The Board expressly stated, "We do not agree with this analysis." Pet. App. B 24.

Pointedly, while the Board rejected both underpinnings for the ALJ's finding of violation, it never rejected his statements that an impasse was required. Furthermore, the Board specifically adopted his finding that Litton had given the Union notice on November 18, 1980, that it did not propose to pay February, 1981 increases, in other words, well over 60 days' notice of its proposal. Pet. App. B 2, C 2-3. The Brief in Opposition at page 2 ignores this fact and misrepresents that the issue was initially disucssed on December 9, 1980. Nor did the Board reject his finding that there were 19 bargaining sessions between November 18, 1980, and the end of February, 1981, and that the February, 1981 wage increases were discussed at three of those sessions. Pet. App. C 2-6. So the Board, in adopting the judge's finding that Litton "made unilateral changes in violation of Sections 8(a)(5) and (1) by refusing to provide a

regularly provided semiannual increase in February 1981," could not possibly have thought Litton had made "a unilateral change" without bargaining with the Union "at all" as the Board Counsel erroneously claims. Indeed, the Board expressly found Litton had bargained in good faith in all 53 bargaining sessions which it reviewed. Pet. App. B 21-22. How can an employer bargain in good faith while refusing to bargain "at all" over the very guts of collective bargaining, wages? It is impossible.

Having rejected both reasons relied upon by the ALJ, and having adopted his findings Litton gave the Union at least 60 days' notice of its proposal not to pay February, 1981 increases, and that the parties had 19 bargaining sessions in which to discuss the matter and did in fact discuss the matter on three such occasions, upon what does the Board base its finding of a violation?

There is oniy one line of reasoning left upon which the Board could have relied: that as of February, 1981, when Litton did not pay the increases, it had not bargained to an impasse over its proposal not to pay them. That the Board reached this conclusion is inescapable for three reasons. First, the Board decision offers no other explanation. If this is not the reason, the Board has impermissibly failed to provide a rationale for its finding. Second, the Board, in the Remedy section of its decision, held that Litton would have to pay the February, 1981 increases and keep them in effect until the first part of August, 1981 because, by then, the parties had reached a valid impasse on wages and Litton had legally implemented its wage proposal not to pay February increases. Pet. App. 26, 34, 44. Obviously, the Board reasoned no impasse had been reached earlier, *i.e.*, in February of 1981. Third, the Court below must have thought the Board relied on its impasse rule;

otherwise, it would not have based its decision enforcing the Board's order on the impasse rule.

There are compelling reasons which this Court should hear for reversing the decision of the Court below with respect to the impasse requirement. The plain meaning of Sections 8(a)(5) and 8(d) conveys no requirement of an impasse. The legislative history of Section 8(d) makes it clear Congress could no longer tolerate the Board compelling employers to make concessions at the bargaining table by using the bad-faith bargaining rule. This Court has confirmed that fact, and has further observed the Board cannot compel concessions under the guise of exercising its remedial powers. *H. K. Porter Company, Inc., Etc. v. National Labor Relations Board*, 397 U.S. 99 at 106, 107-109 (1970).

The Board and Court below have incorrectly applied *National Labor Relations Board v. Katz*, 369 U.S. 736 (1962). *Katz* did not set forth an impasse requirement and stands for nothing more than the proposition an employer may not make changes in mandatory subjects of bargaining under negotiation without first notifying the union, or implement changes which differ in substance from those proposed to the union at the bargaining table, without notice. *Katz* simply does not hold that an employer must maintain the status quo *forever*, or until a dicey impasse is reached. By design, over the years, the Board has cited *Katz* for the proposition an impasse is required, and some courts have accepted the proposition as gospel truth, which it is not. It is possible to irrefutably demonstrate that the impasse requirement is an error which has crept into labor jurisprudence. This court should clarify the true holding and limits of *Katz* and correct the erroneous spin which the Board and some courts have placed on the case.

4. The petition not only presents the impasse question, it raises issues concerning the parameters of *Katz*, particularly, how can the Board hold Litton violated the Act by unilaterally not granting merit increases when, in *Katz*, the Court sustained a Board finding the employer violated the Act by unilaterally granting merit increases?

CONCLUSION

This is a case where the Board necessarily had to rely upon the impasse rule in order to adopt the finding of the ALJ that Litton violated the Act by not paying the February, 1981 merit increases. Indeed, the ALJ specifically found Litton "was obligated to bargain in good faith to impasse with the Union before" refusing to pay the increases. Pet App. C 12. The Board ordered Litton to pay the increase, but only until August, 1981, because by then an impasse had been reached and Litton had implemented its proposal not to pay such increases. Pet. App. B 34, 44. Furthermore, the decision of the court below, which Litton is asking this Court to review, clearly adopts the Board's impasse rule: "Thus, until parties reach impasse in negotiations over labor matters, an employer must 'maintain the status quo as to wages and working conditions.' " Citations omitted. Pet. App. A 3.

A serious injustice is about to be perpetrated if this petition is denied based upon Board Counsel's representation that the Board's decision was grounded upon a finding Litton did not pay February, 1981 merit increases without first notifying the Union of its intention and affording it an ample opportunity to bargain. This is not, as the Board contends, simply a *Katz* case. It cannot be a *Katz* case because the Board adopted the findings of the ALJ that the Union had more than 60 days' notice of

Litton's proposal not to pay the increases, that there were 19 bargaining meetings at which the proposal could have been discussed, and that it was discussed at three such meetings. Pet. App. B 2, C 2-6. This is purely and simply a case which fairly raises the impasse issue, an issue which the Board cannot dispute ought to be resolved by this Court.

One can only speculate why the Board would seek to convince this Court not to resolve an important, recurring and troublesome question swirling in controversy when the Board has only recently represented to this Court, in a most earnest fashion, that this Court ought to resolve the issue. *National Labor Relations Board v. Nabor Trailers, Inc. (NKA Steego Transportation Equipment Centers, Inc.)*, Docket No. 90-1165.

The petition should be granted.

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Respectfully submitted,

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